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CASES

ON THE

LAW OF MORTGAGES

SELECTED AND ANNOTATED

By
EDGAR N. DURFEE
Professor of Law, University of Michigan

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PREFACE

The prominence of secondary material in the following pages requires a word of explanation. The law of mortgages embraces so many remotely related topics that it is impossible, in the time allotted to it in our schools, to cover the subject completely and thoroughly by the ordinary "case method." Of the several alternatives that this condition leaves us, the editor has chosen that of covering by cases, with a fair degree of thoroughness, certain selected topics. It is with a view to presenting to the student, in a suggestive way, some of the topics not covered by cases, that the editor has introduced into the book excerpts from text-books and from judicial opinions, and extensive editorial notes. This material is not designed to be made a part of the regular work of the course but to be a supplement to that work. It is designed to dispose of topics which, in the absence of any such material in the book, the editor, in using the book, would have felt obliged to touch upon by lecture. It is the editor's belief that this matter covers the ground in a way more satisfactory to the student than lectures, and to the obvious saving of class-room time for more profitable use. This material has been distributed through the book with a view to presenting, with the cases and the class-room discussion, a fairly systematic treatment of the subject, but the bulk of it will be found in the first hundred pages. In introducing into the book this secondary material, as in the framing of all notes, the editor has endeavored to avoid placing before the student the answers to the problems presented by the cases, or those related problems which it seemed to him practicable to work out by class-room discussion.

Another feature of this book deserving comment is the relegation, to a position of comparative obscurity, of the question as to whether a mortgage vests a legal title in the mortgagee, and those questions as to incidents of the mortgage relation which are dependent upon that theoretical question—problems which have occupied a more conspicuous place in the subject as it has commonly been taught. This has left an opportunity to give more attention to certain topics which touch the substance of the mortgage as a means of realizing the mortgage debt, but have usually been slighted in the teaching of the subject. This shifting of emphasis the editor believes justified from every

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point of view. With reference to the function of giving information, it brings forward those topics which are of the greater importance. With regard to the function of developing the "legal mind," this course brings forward complex problems of a sort which are not as abundant in the curriculum as the more elementary sort which are thus slighted. Conceding that the elementary problem is the more troublesome, there is good use, especially in the third year, for more work of the complex sort.

The editor is confident that these broad positions will meet general approval. He dares not hope, however, that any one will approve in all particulars the manner in which they have been applied.

The cases reported in this book have almost all been subjected to more or less editing. In order that a multiplication of foot-notes might be avoided, omissions and interpolations have been indicated in the text, the former by asterisks, the latter by square brackets. It should be observed, however, that omissions of the whole or part of the reporter's statement of facts, and of the arguments of counsel have not been indicated. Obvious typographical errors have been corrected without comment, but in doubtful cases the original has been preserved.

The editorial notes do not pretend to completeness. Only those cases have been cited which seemed of peculiar interest, except in a few instances where the unavailability of authorities elsewhere led the editor to cite all the cases with which he was acquainted.

The editor desires to acknowledge his indebtedness to Tiffany's Real Property, Pomeroy's Equity Jurisprudence, and Jones's Mortgages, not only for the excerpts therefrom which appear in this book, but also for help received from them, first and last, in the study of mortgage law. Great help has also been derived from Kirchwey's Cases on Mortgages and Wyman's Cases on Mortgages. Other obligations, too numerous to mention here, are evidenced upon the following pages.

EDGAR N. DURFEE.

Ann Arbor, Mich., January 4, 1915.

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CASES ON MORTGAGES

CHAPTER I.

THEORETICAL NATURE OF THE MORTGAGE.

LANGDELL, CLASSIFICATION OF RIGHTS AND WRONGS, 13 Harv. L. Rev. 539-540. An obligation is either personal or real, according as the obligor is a person or thing.

* * * * * * *

A real obligation is undoubtedly a legal fiction, but it is a very useful one. It was invented by the Romans, from whom it has been inherited by the nations of modern Europe. That it would ever have been invented by the latter is very unlikely, partly because they have needed it less than did the ancients, and partly because they have not, like the ancients, the habit of personifying inanimate things. The invention was used by the Romans for the accomplishment of several important legal objects, some of which no longer exist, but others still remain in full force. It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called servitudes (i. e., states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing, short of owning it. These servitudes were divided into real and personal servitudes, being called real when the obligee as well as the obligor, i. e., the master (*dominus*) as well as the slave (*servus*), was a thing, and personal when the obligee was a person. The former, which may be termed servitudes proper, have passed into our law under the names of easements and profits *a prendre*. The latter included the *pignus* and the *hypotheca*, i. e., the Roman mortgage, which was called *pignus* when the thing mortgaged was delivered to the creditor, and *hypotheca* when it was constituted by a mere agreement, the thing mortgaged remaining in the possession of its owner.

SALMOND, JURISPRUDENCE (3d ed.), § 81. The distinction between real and personal rights is closely connected but not identical with

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that between negative and positive rights. It is based on a difference in the incidence of the correlative duties. A real right corresponds to a duty imposed upon persons in general; a personal right corresponds to a duty imposed upon determinate individuals. A real right is available against the world at large; a personal right is available only against particular persons. The distinction is one of great prominence in the law, and we may take the following as illustrations of it. My right to the peaceable occupation of my farm is a real right, for all the world is under a duty towards me not to interfere with it. But if I grant a lease of the farm to a tenant, my right to receive the rent from him is personal; for it avails exclusively against the tenant himself. For the same reason my right to the possession and use of the money in my purse is real; but my right to receive money from some one who owes it to me is personal. I have a real right against every one not to be deprived of my liberty or my reputation; I have a personal right to receive compensation from any individual person who has imprisoned or defamed me. I have a real right to the use and occupation of my own house; I have a personal right to receive accommodation at an inn.

A real right, then, is an interest protected against the world at large; a personal right is an interest protected solely against determinate individuals. The distinction is clearly one of importance. The law confers upon me a greater advantage in protecting my interests against all persons, than in protecting them only against one or two. The right of a patentee, who has a monopoly as against all the world, is much more valuable than the right of him who purchases the good-will of a business and is protected only against the competition of his vendor. If I buy a chattel, it is an important question, whether my interest in it is forthwith protected against every one, or only against him who sells it to me. The main purpose of mortgages and other forms of real security is to supplement the imperfections of a personal right by the superior advantages inherent in a right of the other class.

* * * * * * *

The distinction between a real and a personal right is otherwise expressed by the terms right *in rem* (or *in re*) and right *in personam*. These expressions are derived from the commentators on the civil and canon law. Literally interpreted, *jus in rem* means a right against or in respect of a thing, *jus in personam* a right against or in respect of a person. In truth, however, every right is at the same time one in respect of some thing, namely, its object, and against some person, namely, the person bound. In other words, every right involves not only a real, but also a personal relation. Yet although these two relations are necessarily co-existent, their relative prominence and importance are not always

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the same. In real rights it is the real relation that stands in the forefront of the juridical conception; such rights are emphatically and conspicuously *in rem*. In personal rights, on the other hand, it is the personal relation that forms the predominant factor in the conception; such rights are before all things *in personam*. For this difference there is more than one reason. In the first place, the real right is a relation between the owner and a vague multitude of persons, no one of whom is distinguished from any other; while a personal right is a definite relation between determinate individuals, and the definiteness of this personal relation raises it into prominence. Secondly, the source or title of a real right is commonly to be found in the character of the real relation, while a personal right generally derives its origin from the personal relation. In other words, if the law confers upon me a real right, it is commonly because I stand in some special relation to the thing which is the object of the right. If, on the contrary, it confers on me a personal right, it is commonly because I stand in some special relation to the person who is the subject of the correlative duty. If I have a real right in a material object, it is because I made it, or found it, or first acquired possession of it, or because by transfer or otherwise I have taken the place of some one who did originally stand in some such relation to it. But if I have a personal right to receive money from another, it is commonly because I have made a contract with him, or have come in some other manner to stand in a special relation to him. Each of these reasons tends to advance the importance of the real relation in real rights, and that of the personal relation in personal rights. The former are primarily and pre-eminently *in rem;* the latter primarily and pe-eminently *in personam*.

* * * * * * *

Ib., § 83. Rights may be divided into two kinds, distinguished by the civilians as *jura in re propria* and *jura in re aliena*. The latter may also be conveniently termed encumbrances, if we use that term in its widest permissible sense. A right *in re aliena* or encumbrance is one which limits or derogates from some more general right belonging to some other person in respect of the same subject-matter. All others are *jura in re propria*. It frequently happens that a right vested in one person becomes subject or subordinate to an adverse right vested in another. It no longer possesses its full scope or normal compass, part of it being cut off to make room for the limiting and superior right which thus derogates from it. Thus the right of a landowner may be subject to and limited by that of a tenant to the temporary use of the property; or to the right of a mortgagee to sell or take possession; or to the right of a neighboring landowner to the use of a way or other easement; or to the right of the vendor of land in respect of

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restrictive covenants entered into by the purchaser as to the use of it; for example, a covenant not to build upon it.

A right subject to an encumbrance may be conveniently designated as *servient,* while the encumbrance which derogates from it may be contrasted as *dominant.* These expressions are derived from, and conform to, Roman usage in the matter of servitudes. The general and subordinate right was spoken of figuratively by the Roman lawyers as being in bondage to the special right which prevailed over and derogated from it. The term *servitus,* thus derived, came to denote the superior right itself rather than the relation between it and the other; just as *obligatio* came to denote the right of the creditor, rather than the bond of legal subjection under which the debtor lay.

The terms *jus in re propria* and *jus in re aliena* were devised by the commentators on the civil law, and are not to be found in the original sources. Their significance is clear. The owner of a chattel has *jus in re propria*—a right over his own property; the pledgee or other encumbrancer of it has *jus in re aliena*—a right over the property of some one else.

There is nothing to prevent one encumbrance from being itself subject to another. Thus a tenant may sublet; that is to say, he may grant a lease of his lease, and so confer upon the sub-lessee a *jus in re aliena* of which the immediate subject-matter is itself merely another right of the same quality. The right of the tenant in such a case is dominant with regard to that of the landowner, but servient with regard to that of the sub-lessee. So the mortgagee of land may grant a mortgage of his mortgage; that is to say, he may create what is called a sub-mortgage. The mortgage will then be a dominant right in respect of the ownership of the land, but a servient right with respect to the sub-mortgage. So the easements appurtenant to land are leased or mortgaged along with it; and therefore, though themselves encumbrances, they are themselves encumbered. Such a series of rights, each limiting and derogating from the one before it, may in theory extend to any length.

A right is not to be classed as encumbered or servient, merely on account of its *natural* limits and restrictions. Otherwise all rights would fall within this category, since none of them are unlimited in their scope, all being restrained within definite boundaries by the conflicting interests and rights of other persons. All ownership of material things, for example, is limited by the maxim, *sic utere tuo ut alienum* non laedas. Every man must so restrain himself in the use of his property, as not to infringe upon the property and rights of others. The law confers no property in stones, sufficiently absolute and unlimited to justify their owner in throwing them through his neighbors windows. No land-owner

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may by reason of his ownership inflict a nuisance upon the public or upon adjoining proprietors. But in these and all similar cases we are dealing merely with the normal and natural boundaries of the right, not with those exceptional and artificial restrictions which are due to the existence of *jura in re aliena* vested in other persons. A servient right is not merely a limited right, for all are limited; it is a right so limited that its ordinary boundaries are infringed. It is a right which, owing to the influence of some other and superior right, is prevented from attaining its normal scope and dimensions. Until we have first settled the natural contents and limits of a right, there can be no talk of other rights which qualify and derogate from it.

It is essential to an encumbrance that it should, in the technical language of our law, run with the right encumbered by it. In other words the dominant and the servient rights are necessarily concurrent. By this it is meant that an encumbrance must follow the encumbered right into the hands of new owners, so that a change of ownership will not free the right from the burden imposed upon it. If this is not so—if the right is transferable free from the burden—there is no true encumbrance. For the burden is then merely personal to him who is subject to it, and does not in truth limit or derogate from the right itself. This right still exists in its full compass, since it can be transferred in its entirety to a new owner. For this reason an agreement to sell land vests an encumbrance or *jus in re aliena* in the purchaser; but an agreement to sell a chattel does not. The former agreement runs with the property, while the latter is non-concurrent. So the fee simple of land may be encumbered by negative agreements, such as a covenant not to build; for speaking generally, such obligations will run with the land into the hands of successive owners. But positive covenants are merely personal to the covenantor, and derogate in no way from the fee simple vested in him, which he can convey to another free from any such burdens.

Concurrence, however, may exist in different degrees; it may be more or less perfect or absolute. The encumbrance may run with the servient right into the hands of some of the successive owners and not into the hands of others. In particular, encumbrances may be concurrent either in law or merely in equity. In the latter case the concurrence is imperfect or partial, since it does not prevail against the kind of owner known in the language of the law as a purchaser for value without notice of the dominant right. Examples of encumbrances running with their servient rights at law are easements, leases, and legal mortgages. On the other hand an agreement for a lease, an equitable mortgage, a restrictive covenant as to the use of land, and a trust will run with their respective servient rights in equity but not at law.

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It must be carefully noted that the distinction between *jura in re propria* and *jura in re aliena* is not confined to the sphere of real rights or *jura in rem*. Personal, no less than real rights may be encumbrances of other rights. Personal, no less than real rights may be themselves encumbered. A debtor, for example, may grant a security over the book debts owing to him in his business or over his shares in a company, as well as over his stock in trade. A life tenancy of money in the public funds is just as possible as a life tenancy of land. There can be a lien over a man's share in a trust fund, as well as over a chattel belonging to him. The true test of an encumbrance is not whether the encumbrancer has a *jus in rem* available against all the world, but whether he has a right which will avail against subsequent owners of the encumbered property.

The chief classes of encumbrances are four in number, namely, Leases, Servitudes, Securities, and Trusts.

1. A lease is the encumbrance of property vested in one man by a right to the possession and use of it vested in another.

2. A servitude is a right to the limited use of a piece of land unaccompanied either by the ownership or by the possession of it; for example, a right of way or a right to the passage of light or water across adjoining land.

3. A security is an encumbrance vested in a creditor over the property of his debtor, for the purpose of securing the recovery of the debt; a right, for example, to retain possession of a chattel until the debt is paid.

4. A trust is an encumbrance in which the ownership of property is limited by an equitable obligation to deal with it for the benefit of some one else. The owner of the encumbered property is the trustee; the owner of the encumbrance is the beneficiary.

Ib., § 84. The relation between principal and accessory rights is the reverse of that just considered as existing between servient and dominant rights. For every right is capable of being affected to any extent by the existence of other rights; and the influence thus exercised by one upon another is of two kinds, being either adverse or beneficial. It is adverse, when one right is limited or qualified by another vested in a different owner. This is the case already dealt with by us. It is beneficial, on the other hand, when one right has added to it a supplementary right vested in the same owner. In this case the right so augmented may be termed the *principal,* while the one so appurtenant to it is the *accessory* right. Thus a security is accessory to the right secured; a servitude is accessory to the ownership of the land for whose benefit it exists; the rent and covenants of a lease are accessory to the landlord's ownership of the property; covenants for title in a conveyance

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are accessory to the estate conveyed; and a right of action is accessory to the right for whose enforcement it is provided.

A real right may be accessory to a personal; as in the case of a debt secured by a mortgage of land. A personal right may be accessory to a real; as in the case of the covenants of a lease. A real right may be accessory to a real; as in the case of servitudes appurtenant to land. And finally a personal right may be accessory to a personal; as in the case of a debt secured by a guarantee.

HOLLAND, JURISPRUDENCE (10th ed.), pp. 222-226. The *iura in re aliena*[1] which have hitherto been considered [Servitudes] are given with a single purpose. Their object is to extend the advantages enjoyed by a person beyond the bounds of his own property. But there is also a right of the same class which is given, not with this object, but for the merely subsidiary purpose of enabling the person to whom it is granted to make sure of receiving a certain value to which he is entitled; if not otherwise, then at all events by means of the right in question. The other rights *in re aliena* enable the person entitled to them to enjoy the physical qualities of a thing. This right, which is known as Pledge, merely enables a person who is entitled to receive a definite value from another, in default of so receiving it, to realize it by eventual sale of the thing which is given to him in pledge.

The right of sale is one of the component rights of ownership, and may be parted with separately in order thus to add security to a personal obligation. When so parted with, it is a right of pledge, which may be defined as "a right *in rem,* realizable by sale, given to a creditor by way of accessory security to a right *in personam.*"

* * * * * * *

The objects aimed at by a law of pledge are, on the one hand, to give the creditor a security on the value of which he can rely, which he can readily turn into money, and which he can follow even in the hands of third parties; on the other hand, to leave the enjoyment of the thing in the meantime to its owner, and to give him every facility for disencumbering it when the debt for which it is security shall have been paid.

The methods by which these objects can best be attained, and the degree in which they are attainable, must vary to some extent with the nature of the thing pledged. Probably the rudest method is that which involves an actual transfer of ownership in the thing from the debtor to the creditor, accompanied by a condition for its retransfer upon due payment of the debt. Such was the *fiducia* of the older Roman law, such is the Scotch *wadset,* and such is

[1] From the context it appears that Mr. Holland, unlike Mr. Salmond, confines the term "jus in re aliena" to a sub-classification of rights in rem.

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the English mortgage, of lands or goods, at the present day, except in so far as its theory has been modified by the determination of the Court of Chancery and of the Legislature to continue, as long as possible, to regard the mortgagor as the owner of the property. Lord Mansfield was unsuccessful in attempting to induce the Courts of Common Law to take the same view.

Another method, which must always have been practiced, is that in which the ownership of the object remains with the debtor, but its possession is transferred to the creditor. This was called by the Romans *pignus*. As a rule the creditor cannot make use of the thing which is thus in his custody. If he is to take its profits by way of interest, the arrangement is called *antichresis*. He had originally no power of sale without express agreement, but this became customary, and was at least presumed.

* * * * * * *

Yet another mode of creating a security is possible, by which not merely the ownership of the thing but its possession also remains with the debtor. This is called by the Roman lawyers and their modern followers *hypotheca*. *Hypothecs* may arise by the direct application of a rule of law, by judicial decision, or by agreement. Those implied by law, generally described as *tacit hypothecs*, are probably the earliest. They are first heard of in Roman law in connection with that right of a landlord over the goods of his tenant, which is still well known on the continent and in Scotland under its old name, but in England takes the form of a right of Distress. Similar rights were subsequently granted to wives, pupils, minors, and legatees, over the property of husbands, tutors, curators, and heirs respectively.

The action by which the *praetor Servius* first enabled a landlord to claim the goods of his defaulting tenant in order to realize his rent, even if they had passed into the hands of third parties, was soon extended so as to give similar rights to any creditor over property which its owner had agreed should be held liable for a debt. A real right was thus created by the mere consent of the parties, without any transfer of possession, which, although opposed to the theory of Roman law, became firmly established as applicable both to immovable and movable property. Of the modern states which have adopted the law of *hypothec*, Spain perhaps stands alone in adopting it to the fullest extent. The rest have, as a rule, recognized it only in relation to immovables. Thus the Dutch law holds to the maxim *mobila non habent sequelam*, and the French Code, following the *coutumes* of Paris and Normandy, lays down that *les meubles n'ont pas de suite par hypotheque*. But by the *Code de Commerce*, ships, though movables, are capable of hypothecation; and in England what is called a mortgage, but is essentially a *hypothec*, of ships is recognized and regulated by the

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"Merchant Shipping Acts," under which the mortgage must be recorded by the registrar of the port at which the ship itself is registered. So also in the old contract of "bottomry," the ship is made security for money lent to enable it to proceed upon its voyage.

SALMOND, JURISPRUDENCE, § 85. In a former chapter we considered the distinction between common law and equity. We saw that these two systems of law, administered respectively in the courts of common law and the Court of Chancery, were to a considerable extent discordant. One of the results of this discordance was the establishment of a distinction between two classes of rights, distinguishable as legal and equitable. Legal rights are those which were recognized by the courts of common law. Equitable rights (otherwise called equities) are those which were recognized solely in the Court of Chancery. Notwithstanding the fusion of law and equity by the Judicature Act, 1873, this distinction still exists, and must be reckoned with as an inherent part of our legal system. That which would have been merely an equitable right before the Judicature Act is merely an equitable right still.

Inasmuch as all rights, whether legal or equitable, now obtain legal recognition in all courts, it may be suggested that the distinction is now of no importance. This is not so, however, for in two respects, at least, these two classes of rights differ in their practical effects.

1. The methods of their creation and disposition are different. A legal mortgage of land must be created by deed, but an equitable mortgage may be created by a written agreement or by a mere deposit of title-deeds. A similar distinction exists between a legal and an equitable lease, a legal and an equitable servitude, a legal and an equitable charge on land, and so on.

2. Equitable rights have a more precarious existence than legal rights. Where there are two inconsistent legal rights claimed adversely by different persons over the same thing, the first in time prevails. *Qui prior est tempore potior est jure.* A similar rule applies to the competition of two inconsistent equitable rights. But when a legal and an equitable right conflict, the legal will prevail over and destroy the equitable, even though subsequent to it in origin, provided that the owner of the legal right acquired it for value and without notice of the prior equity. As between a prior equitable mortgage, for example, and a subsequent legal mortgage, preference will be given to the latter. The maxim is: Where there are equal equities, the law will prevail. This liability to destruction by conflict with a subsequent legal right is an essential feature and a characteristic defect of all rights which are merely equitable.

Ib., § 91. Closely connected but not identical with the distinction between trust and beneficial ownership is that between legal and

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equitable ownership. One person may be the legal and another the equitable owner of the same thing at the same time. Legal ownership is that which has its origin in the rules of the common law, while equitable ownership is that which proceeds from rules of equity divergent from the common law. The courts of common law refused to recognize equitable ownership, and denied that the equitable owner was an owner at all. The Court of Chancery adopted a very different attitude. Here the legal owner was recognized no less than the equitable, but the former was treated as a trustee for the latter. Chancery vindicated the prior claims of equity, not by denying the existence of the legal owner, but by taking from him by means of a trust the beneficial enjoyment of his property. The fusion of law and equity effected by the Judicature Act, 1873, has not abolished the distinction; it has simply extended the doctrines of the Chancery to the courts of common law, and as equitable ownership did not extinguish or exclude legal ownership in Chancery, it does not do so now.

MAITLAND, EQUITY, p. 122. Equitable estates and interests are rights *in personam* but they have a misleading resemblance to rights *in rem*. This resemblance has been brought about in the following way. The trust will be enforced not only against the trustee who has accepted it and his representatives and volunteers claiming through or under him, but also against persons who acquire legal rights through or under him with knowledge of the trust—nor is that all, it will be enforced against persons who acquire legal rights or under him if they ought to have known of the trust. The Court of Chancery set up a standard of diligence for purchasers and a high one, one so high that it certainly is difficult for a purchaser to buy land without obtaining constructive notice of all trusts which concern that land. Still now and again the difficulty is surmounted, and then the true character of equitable rights becomes apparent —a purchaser acquires a legal right *bona fide,* for value, and without notice either actual or constructive of the trust, and he holds the land successfully against *cestui que trust,* and *cestui que trust* may then comfort himself with the reflection that the land never was his.

CURTIS, J., in THE YOUNG MECHANIC, Fed Cas. 18180 (U. S. C. C., 1855). Equitable liens * * * arise out of constructive trusts and are neither *jus in re* nor *jus ad rem;* but simply a duty, binding on the conscience of the owner of the thing, and which a court of equity will compel him specifically to perform.

EDITORIAL NOTE: HISTORY OF ENGLISH MORTGAGE LAW TO THE TIME OF LORD MANSFIELD. The idea of a lien held by one person upon the property of another for the purpose of securing the performance of an obligation seems a simple one, but for various rea-

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sons this simple concept has never found a simple expression in the laws of any people. Instead we have laws framed upon concepts which are wholly foreign to this simple lien idea and which required twisting and stretching to make them serve the end.[2] This is conspicuously true of our law of real property mortgages. The result is a body of law full of fictions, contradictions and technicalities which are intelligible only when approached historically.

A history of mortgage law must begin in the middle ages, but we may pass by all medieval forms of gage, other than the conditional feoffment hereafter discussed, with the observation that they were numerous and of diverse origin and nature[3] Some of them more nearly approximated, in their operation, the modern mortgage than did the conditional feoffment, but there is apparently no historical connection of any importance here. It is the conditional feoffment from which the modern mortgage developed, and we will proceed at once to its examination.

Subject to great variation of detail, the groundwork of this form of security was a conveyance (which, in most cases, meant, of course, a feoffment) upon condition that, if a certain sum of money was paid by the feoffor to the feoffee at a certain time, the conveyance should be void.[4]

This form of transaction soon acquired the name "mortgage." Although not unknown at an earlier period, it came into prominence between the age of Bracton and that of Littleton (in or about the fourteenth century) and steadily grew in favor until it

[2] See The Pledge Idea, J. H. Wigmore, 10 Harv. L. Rev. 321, 11 Ib. 18.

[3] See The Gage of Land in Mediaeval England, H. D. Hazeltine, 17 Harv. L. Rev. 549, 18 ib. 36.

[4] The following is a translation of a charter of defeasance, accompanying a conditional feoffment of the year 1341, taken from Madox, Formulare Anglicanum.

"This indenture witnesseth that as John Balet of Enebourne has given and granted to Thomas Monalf and to his heirs a farm called Crowescroft and a meadow called Lawrencemede with their appurtenances in Enebourne as more fully appears by a charter of feoffment to said Thomas by him made: I, the aforesaid Thomas, will and grant for myself and for my heirs and executors that if said John or his heirs pay or cause to be paid to me or to my heirs and my executors ten pounds in money at any time within the next ten years ensuing after this writing; in that case that the said charter of feoffment be annulled and held void for all time: And if the said John or his heirs do not pay or cause to be paid to the said Thomas or to his heirs or to his executors the aforesaid ten pounds at any time within the specified term of ten years next ensuing; that said charter stand in its force and nature to him the said Thomas and to his heirs forever without impeachment of said John or of his heirs forever.

"In Witness Whereof, the aforesaid Thomas and John mutually have placed their seals on this indenture; by these witnesses, Walter de Nortone, Curtle T. More. Given at Neuburiz the Saturday next following the feast of the Apostles Saint Philip and Saint Jacob, in the 14th year of the reign of King Edward III, after the Conquest."

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supplanted all other forms of gage of land, became the mortgage of the classical period of the common law, and, with the substitution of grant for feoffment, is substantially the mortgage of today. The reasons for the predominance of this form of security were, it is safe to say, the lender's reasons—in other words, it represents the demand of the lending class for satisfactory security.

In considering the legal effect of this form of transaction—that is to say, its operation as enforced by the courts—we must examine separately the doctrines of law and equity.

We will first consider the state of the law, using that word in the narrow sense. We must remember that throughout this period, as at the present day, there was a very definite and comparatively simple law of conditional estates, of which we may say that it succeeded quite well in giving effect to the express provisions of conditional conveyances. It is not surprising, then, that a conveyance conditioned to be void on the payment of a sum of money was treated by the courts of law like any other conveyance on condition subsequent, by making a quite literal application of its stipulations. The result, of course, was that, prior to the time fixed for payment, the feoffee had an estate in fee simple, defeasible on performance of the condition; that upon performance of the condition by payment of the sum named at the day named, a right of reentry arose in favor of the feoffor, upon the exercise of which the estate revested in him; while upon default, or non-performance of the condition, by failure to pay the sum named on the day named, the estate of the feoffee became absolute. We can say, then, that, during this period the courts of law had no specialized rules for mortgages that could be called a "law of mortgages," but that mortgages were governed by the law of conditional estates.[5]

We will next consider the status of the mortgage in equity during the same period. These years see the growth of Chancery from a semi-judicial office of doubtful authority to a fully developed court, exercising a limited jurisdiction, but, within its limitations, enjoying practical supremacy over the courts of law. It is impossible to say when the Chancellors first interfered in the mortgage relation, but they became active in this field in the seventeenth century.

The position of the Chancellors was that the mortgage, while in form a conveyance on condition subsequent, was intended merely as a security for money; that the function of security was performed if the mortgagee got back his money, even after the day named in the mortgage; and that the operation of the rules of law

[5] Littleton, for example, while he applies to this form of transaction, the term "mortgage," treats of it under the head of Estates Upon Condition, without showing any differentiation in the law applicable to it. Tenures, §§ 332-344.

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upon default worked a hardship upon the mortgagor, against which equity should relieve.[6] At the suit of the mortgagor they would compel the mortgagee to reconvey the estate, upon payment of the debt, even though it was long past the "law day" named for payment, so that the mortgagee had acquired absolute ownership of the land at law. This relief was called "redemption."[7] At first, we may assume, it was granted only in cases of unusual hardship, as where the land was worth many times the debt, but presently became a matter of course and of right in all cases. At this point the mortgagee found that his legal rights, which hitherto had been entirely adequate to his purposes, were so no longer. He had the legal title to the land, as before, but he was now liable at any time to be hailed into the Court of Chancery and compelled to relinquish his title, and this equitable liability would extend, of course, to any purchaser with notice. The result was that, until the mortgagor chose to redeem, the mortgagee was left without his money and without the power of disposing of the land to raise the money. For relief from this situation the mortgagee was, himself, forced to seek the Court of Chancery, and that court, perceiving that the right to redeem could not be indefinitely extended without impairing the usefulness of mortgages, granted a decree of "foreclosure," cutting off or "foreclosing" the mortgagor's equitable right to redeem and leaving the mortgagee's legal title absolute.

In redemption and foreclosure we have the ground work of the equitable doctrine of mortgages, but the elaboration of that doc-

[6] The stock justification of the equitable doctrine of mortgages is that it gives effect to the real intention of the parties, regarding the substance rather than the form. So far as concerns the original interposition of equity, this is, of course, specious. While the purpose of the parties was to secure the payment of a sum of money, they manifestly intended, and so evidenced in the most conclusive way, to accomplish this purpose by means of a conditional conveyance. What equity really did, then, was not to give effect to the intention of the parties, but to defeat their intention, to limit their freedom of contract, and to impose upon them rules of law which they could not avoid by any form of agreement or by any expression of intention. Under the guise of enforcing the intention of the parties, the court in reality enforced the intention which it conceived that they in good conscience ought to entertain. In this regard the doctrine of equity which declares the mortage a mere security is of one piece with that which declares that agreements, however explicit, which clog the equity of redemption, are void. Hazeltine v. Granger, post; Pierce v. Robinson, post.

The true justification of the equitable doctrine of mortgages lies in the fact that lender and borrower are not usually on an equal footing and that the latter needs protection against the former, needs protection even against himself in his borrowing transactions. This is, of course, the same idea which lies behind the usury statutes. See Vernon v. Bethell, post, n. 1, Chap. VI.

[7] The term "redemption" is also applied to voluntary payment and discharge of a mortgage, out of court.

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trine should be traced in its main features. The right of the mortgagee to redeem the land in equity constituted, of course, an "equitable estate" in the land, which was called the "equity of redemption."[8] Under the rule that equity follows the law, this equitable estate, like all others, possessed many of the characteristics of legal estates, viz., it descended to the heir, could be conveyed or devised, and could be cut up into lesser estates, and in general, could be dealt with in the same manner as a legal estate, always subject, of course, to the outstanding rights of the mortgagee. In short, the mortgagor was treated in equity as the real owner of the land, though at law he was held to have parted with his title. Consistently with this position, the interest of the mortgagee in the land, though held at law to be ownership, was regarded in equity as a security only. From this it followed that the debt was regarded as the principal right and the interest in the land as a mere incident or accessory of the debt. Therefore this interest in the land automatically followed the debt when the latter was transferred by assignment and no conveyance of the land was necessary. Likewise this interest passed with the debt to executors or administrators and not to heirs. Thus the interest of the mortgagee in the land came to be, in equity, a personal or chattel interest.

This is substantially the equitable doctrine of mortgagee as it stood at the middle of the eighteenth century. Up to this point the rules of law remained in the form outlined above, but, by reason of the practical supremacy of equity within the field of its activity, the equitable doctrines had come to be the real, substantial "law of mortgages," so recognized everywhere except in courts of law.

In 1756 Lord Mansfield came to the Court of Kings Bench. Learned in the civil law, he never sympathized with the separation of law and equity and as a result was constantly making equitable innovations upon the common law. In 1760, in the case of Martin v. Mowlin,[9] construing a will, he said: "A mortgage is a charge upon the land; and whatever would give the money would carry the estate in the land along with it. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it, though the debt were forgiven only by *parol;* for the right to the land would follow, notwithstanding the statute

[8] By a natural process this term comes to be loosely used to denote the mortgagor's interest in the land from the time the mortgage is executed until the mortgage relation is terminated, entirely regardless of whether such interest is legal or equitable, or whether it amounts to a mere right to redeem or to general ownership.

[9] 2 Burr. 969.

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of frauds." After decisions of similar import in Ren v. Bulkeley,[10] in 1779, and Eaton v. Jacques,[11] in 1780, we come, in 1781, to the much cited case of King v. St. Michaels.[12] This was a case of pauper settlement. In the course of his opinion Lord Mansfield said: "If the estate on which a pauper resides is substantially his property, that is sufficient, whatever forms of conveyance there may be; and therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say the mortgagor is not the real owner."[13]

STEPHEN, J., in EVANS v. MERRIKEN, 8 Gill. & J. 39 (Md. 1836). By the deed of mortgage, the legal estate becomes vested in the mortgagee, defeasible at law upon the performance of the condition and payment of the money at the time stipulated; but upon default of the mortgagor in the non-payment of the money at that time, it becomes indefeasible at law, and defeasible only in equity, where the mortgage is considered only as a security for the debt, and the mortgagor, notwithstanding his default, will be permitted to redeem. It is true in 2 Burr. 978, Lord Mansfield, in delivering the opinion of the court, says, "a mortgage is a charge upon the land, and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will, not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence; nay it would do it, though the debt were forgiven only by parol; for the right of the land would follow, notwithstanding the statute of frauds."

But in Doug. Rep. 22, his lordship at a later period of his judicial life, in deciding that a mortgagee might recover in ejectment (without giving notice to quit) against a tenant claiming under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee, held the following language, "when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and therefore, no notice is ever given him to quit,

[10] Doug. 292.
[11] Doug. 455.
[12] Doug. 630.
[13] These views of Lord Mansfield were not accepted by the English courts, and by the law of England today the mortgagee has, after default, the absolute legal title, and the mortgagor but an equitable interest. See Maitland, Equity, 281. And see Lord Redesdale's strictures on Lord Mansfield in Shannon v. Bradstreet, 1 Sch. & Lef. 52, 65. Other decisions of Lord Mansfield himself greatly qualified these declarations. See Keech v. Hall, 1 Doug. 21; Moss v. Gallimore, 1 Doug. 279.

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and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage." And the Supreme Court of the United States, in speaking upon the subject of the title passed by the deed of mortgage, and the interest acquired by the mortgagee, in the thing mortgaged, express themselves in the following terms, "it is true that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more. It is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law.

"It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties as a qualified estate and security. When the debt is discharged there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible."[14] From these decisions, it results that the mortgagee must be considered as having an estate or interest in the subject matter of the mortgage, not absolute it is true, because such an estate is not imported by the terms of the mortgage deed, but an interest commensurate with the object contemplated to be attained by it, as a security for the payment of the debt due from the mortgagor to the mortgagee. From these general views and considerations, relative to the respective rights of the parties to the instrument of mortgage, we are led to the consideration of the question arising in this case, and involved in the decision of this controversy. And that question is, whether the issue of a female slave, herself, the subject of the mortgage, born after the title of the mortgagee has become absolute at law, and during the possession of the mortgagor, is liable for the payment of the mortgage debt. For it must be borne in mind that the question is not whether the mortgagee is entitled to hold the issue as his own property in absolute right, but as security for the payment of his debt only. Upon the fullest consideration we have been able to bestow upon the subject, aided by all the lights and information with which we have been furnished, by an examination of the decisions of the courts of our sister states upon similar subjects, we have come to the conclusion that right and justice require that the issue so born should be liable, and that neither the principles of law nor equity forbid it. In the language of Lord Mansfield, before adverted to, when speak-

[14] Quotation from Conard v. Atlantic Ins. Co., 1 Peters (U. S.) 386, 441.

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ing of the growing crop, when possession is taken by the mortgagee, we think, "all is liable to the debt, on payment of which the mortgagee's title ceases."[15]

AGNEW, J., in TRYON v. MUNSON, 77 Pa. St. 250 (1874). The mortgage passes to the mortgagee the title and right of possession to hold till payment shall be made. He may, therefore, enter at pleasure, and take actual possession—use the land and reap its profits. Now this title or lawful right to possess, and actual *pedis possessio,* are not ideal or contemplative merely, but are real and tangible. True, the right is conditional, and will cease on payment of the debt; but until the condition is performed, the title and possession are as substantial and real as though they were absolute. The evidence of this is that the mortgagee may dispossess and hold out the mortgagor until he performs the condition, or until the perception of the profits reaches the same result. Thus we perceive an interest or estate in the land itself, capable of enjoyment, and enabling the mortgagor to grasp and hold it actually, and not a mere lien or potentiality, to follow it by legal process and condemn it for payment. The land passes to the mortgagee by the act of the party himself, and needs no legal remedy to enforce the right. But a lien vests no estate, and is a mere incident of the debt, to be enforced by a remedy at law, which may be limited.

STORRS, J., in GOODMAN v. WHITE, 26 Conn. 316 (1857). After the delivery of the first mortgage deed the legal title to the land conveyed was in the first mortgagee. An equitable right, an equity of redemption, was all that remained in the former owner, and all that he could mortgage to a third person. It is true that a second mortgage purports to be a conveyance of the land itself, and as between the parties to the instrument it is such; and whenever the estate of the first mortgagee is divested the second mortgage will operate fully as a conveyance of the land. But so long as the first mortgage is outstanding, the second mortgagee receives only a transfer or assignment of the mortgagor's equity or equitable right.[16]

SANDERS v. REED.

SUPREME COURT OF NEW HAMPSHIRE, 1842.
12 N. H. 558.

Trespass, for breaking the plaintiff's close, and cutting certain pine trees; submitted upon a statement of facts.

On the 16th day of September, 1839, Norris Colburn, being in

[15] Compare Duval v. Becker, 81 Md. 537.

[16] Compare Chamberlain v. Thompson, 10 Conn. 243; Bates v. Coe, 10 Conn. 280; Clinton v. Westbrook, 38 Conn. 9.

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possession of the premises, conveyed the same to Stephen G. Tyler, and on the same day took a mortgage back from Tyler, which mortgage, on the 21st day of November, 1839, was duly assigned to the plaintiffs. Tyler remained in the actual possession of the premises, from the date of his mortgage deed until the 3d day of March, 1841, when the plaintiffs took possession. The trees were cut by the defendant, under a license from Tyler, between the first day of January, 1841, and the first day of March, of the same year.

On the 17th day of May, 1837, Colburn, being the owner of this land, mortgaged it, with other real estate, to Susan Robeson, to secure the payment of certain notes signed by him and Milton Chaplin. On the 16th day of April, 1841, Chaplin paid the notes to Mrs. Robeson, and they were delivered to him, but the mortgage deed still remains in her hands, undischarged. The notes were joint and several, but as between Colburn and Chaplin they were the proper debts of Colburn. The payments were made by Chaplin, with the avails of the sale of that portion of the lands mortgaged to Mrs. Robeson not included in the mortgage to the plaintiffs, excepting about two hundred dollars, paid from his own money. This last sum is secured by an attachment of the real estate of Colburn.

Colburn occupied the land until the date of his deed to Tyler, and Tyler occupied until the 3d day of March, 1841, when the plaintiffs took possession. Colburn and Tyler, during the time of their occupancy, dealt with the premises as their own, by cutting timber, manufacturing the same, and selling, without let, hindrance, or molestation, either from the mortgagee or the assignees.

Mrs. Robeson lived thirty miles from the premises, and the plaintiffs live fifteen miles from the same, and no evidence exists that either of them had any knowledge of the manner the mortgagors were dealing with the premises, nor does it appear that they attempted to ascertain.

PARKER, C. J. There is a principle in equity, that a surety is entitled to the benefit of any security which the creditor may have taken from the principal.

Whether Chaplin could have availed himself of this principle, and have held under the mortgage to Mrs. Robeson, is a question which it does not seem necessary to settle in this case. He paid the notes and discharged the debt, without obtaining the mortgage, and without making any claim to the benefit of it, so far as appears from this case. For the balance which he paid, he has made an attachment, and is secured. There is no reason for thrusting an interest upon him which he has never claimed.

In fact, it may admit of doubt whether he would be entitled to

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the benefit of such a principle against Tyler, a *bona fide* purchaser, or against the plaintiffs, as assignees of Tyler's mortgage, unless they can be made chargeable with notice that Chaplin was a surety, and therefore took subject to his rights as such. The defendant is in no way connected with Chaplin, nor have any rights of the latter been urged in the argument as sustaining the defense.

It is settled that a mortgagee may maintain trespass against a mortgagor for cutting timber upon the land, unless his assent is shown, or is fairly to be deduced from the circumstances of the case. Smith v. Moore (11 N. H. Rep. 551); 5 N. H. Rep. 54, Pettengill v. Evans. There is no evidence of assent in this case, and the plaintiffs' right of action would be clear, had they held the first mortgage upon the land at the time.

But it is contended that the mortgage to Mrs. Robeson was in force, as a valid title to the land, at the time when the timber was cut; and that if there was any right of action for the cutting, it was in her, and not in the plaintiffs; or, at least, that by reason of that mortgage, and the actual possession of the defendant, the plaintiffs, who were second mortgagees, had neither the actual nor constructive possession, and cannot therefore maintain this action.

We are of opinion that this objection cannot avail.

A mortgage (as was stated in the case Smith v. Moore) is regarded as a mere security for the debt, or as passing the legal estate, whichever may be necessary for the preservation of the rights of the mortgagee. The mortgagee has the legal estate for the purpose of all lawful protection of his interests.

Tested by this rule, Mrs. Robeson is not in this case to be regarded as having the legal estate, at the time when this timber was cut, notwithstanding her mortgage was then in existence, because that is not necessary, in order to the protection of her interests. Her mortgage has been satisfied; and, so far as appears, she made no claim on account of this act, as injurious to her. She has no interest to be protected, and no reason to make any objection, nor can she now maintain any action. There is no fair purpose to be answered by considering the legal estate in her, as the result would only be to defeat a right of action which would otherwise lawfully exist in the plaintiffs, and this without any benefit to her.

Tyler, who made the second mortgage, had no more right to do acts of waste against the second mortgagee, or his assignee, than he had as against the first. Each mortgagee, for the purpose of protecting his rights, is to be regarded, as against the mortgagor, as holding the legal estate. Any act of waste, without the assent of either, may be regarded as injurious to both. The paramount right of action in such case may be regarded as in the first mortgagee, so long as the first mortgage exists; and it may be supposed

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to be a good defense to an action by the second mortgagee, that the first mortgage still existed, unless it could be shown that the first mortgagee assented, and therefore had no right of action. But it appearing that the first mortgage is extinguished, and that no paramount right exists, and the defendant therefore not being answerable to any one else, there seems to be no good reason why he who was a wrongdoer, as to both, should not answer to the second mortgagee, who, after the extinguishment of the first mortgage, may well be regarded as having been the owner of the legal estate, so far as that is necessary to the preservation of his rights under the mortgage. The first mortgage, under such circumstances, is to be regarded as having been a mere security.

This view of the matter does not prejudice any right of the defendant. He stands confessedly in the place of the mortgagor, and had no right, as against either mortgagee, to do any act of waste. As against either mortgage, standing alone, an act of waste, without assent, would be a wrong, for which trespass might be maintained.

The first mortgage having been removed without any entry by the mortgagee, the defendant is relieved from any danger of a claim upon that mortgage, and the case therefore now stands as if that mortgage had never existed. To interpose that mortgage, as a conveyance of the legal estate, would be to interpose a technical objection for the purpose of working injustice, and would enable a mortgagor to impair the security of the second mortgagee with impunity unless he were restrained by injunction.

Judgment for the plaintiffs.

JOHNSON, C. J., in MARTIN v. ALTER, 42 Ohio St. 94 (1884). In the case of a mortgage in the usual form, the legal estate remains in the mortgagor in possession, even after condition broken as to all the world, except the mortgagee.

The legal title remaining in the mortgagor is liable to levy and sale on execution. It descends to his heirs, subject to the conditional estate to the mortgagee.

The latter may maintain ejectment or take other legal steps to obtain possession after condition broken, but until he does so, the mortgagor is at law owner of the fee. The mortgage is a conditional conveyance which becomes void upon payment of the debt, without a formal reconveyance.

SHAW, C. J., in EWER v. HOBBS, 5 Metc. 1 (Mass. 1842). The first great object of a mortgage is, in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt, or the performance of some other obligation. The next is, to leave to the mortgagor, and to purchasers, creditors, and all others claim-

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ing derivatively through him, the full and entire control, disposition and ownership of the estate, subject only to the first purpose, that of securing the mortgagee. Hence it is that, as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee; because that construction best secures him in his remedy and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with, as the estate of the mortgagor. And all the statutes upon the subject are to be so construed; and all rules of law, whether administered in law or in equity, are to be so applied as to carry these objects into effect. In an early case in Massachusetts, it was held by Chief Justice Parsons, that where a mortgage was made to partners, in such form as would ordinarily create a tenancy in common in other grantees—inasmuch as it was designed to secure a joint debt, which, in case of the decease of one partner, would vest in the survivor for the purpose of collection, and subject to the partnership debts—the estate should be held to be a joint tenancy, in order that by the principle of survivorship, applicable to that tenure, the real security might accompany the debt. Appleton v. Boyd, 7 Mass. 131. This doctrine was earnestly opposed by Mr. Justice Story in the case of Randall v. Phillips, 3 Mason 378, who insisted that such mortgage, so far as it operated as a transfer of the legal estate, was to be construed as a tenancy in common, and not a joint tenancy. But at the same time he maintained that on the death of one partner, the heirs of the deceased would take a moiety, charged with an implied trust to hold for the survivor, as security for the debt.[17]

CARTWRIGHT, J., in LIGHTCAP v. BRADLEY, 186 Ill. 510 (1900). Leaving out of consideration the effect of a mortgage in the statutory form, it is true that a mortgage or trust deed like the one in question here, which purports to convey title, does, as between the mortgagor and mortgagee, convey such title; but it is only a qualified conveyance of the land, and the mortgagor parts with the title only as security to his creditor and during the existence of his debt or obligation. In the development of the law of real estate mortgages in England the mortgage was at first a pledge of

[17] "Although, as between mortgagor and mortgagee, it is a transmission of the fee, which gives the mortgagee a remedy in the form of a real action, and constitutes a legal seizin; yet to most other purposes, a mortgage before the entry of the mortgagee is but a pledge and real lien, leaving the mortgagor to most purposes the owner." Shaw, C. J., in Howard v. Robinson, 5 Cush. (Mass.) 119. Compare Gooding v. Shea, post.

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land, usually requiring a judgment to complete the transfer of title and to vest it in the mortgagee. Afterward, a form of mortgage came into use which vested title of itself, and the pledge changed into an estate in fee without judicial foreclosure upon the mortgagor's default. This mortgage vested absolute title in the mortgagee upon condition broken. Courts of equity, however, recognizing the purpose of the mortgage as merely a pledge to secure a debt, established a right of the mortgagor to redeem. They created a new estate in the form of the equity of redemption and a remedy for the creditor to cut off this estate. A proceeding was devised to extinguish the mortgagor's right to redeem and to vest title in the mortgagee, and this was the proceeding now known as strict foreclosure. (9 Ency. of Pl. & Pr. 118.) Equity assumed jurisdiction to relieve the mortgagor against a forfeiture upon default, and he was relieved from it on payment of the debt. (1 Jones on Mortgages, § 8.) Courts of law, following the lead of courts of equity, have adopted many equitable principles as to the titles of the respective parties, and at law the title of the mortgagee can be used only for the purpose of securing his equitable rights under it. "As to all persons except the mortgagee and those claiming under him, it is everywhere the established modern doctrine that a mortgagor in possession is at law, both before and after breach of the condition, the legal owner." (1 Jones on Mortgages, § 11.) In many of the states a mortgage confers no title or estate upon the mortgagee, and it is nothing but a mere security for a debt or obligation. This state has adhered to the rule that at law a title vests in the mortgagee, but only for the protection of his interests. For the purpose of protecting and enforcing his security the mortgagee may enter and hold possession by virtue of his title and take the rents and profits in payment of his mortgage debt. He may maintain the possessory action of ejectment on the strength of such title, but the purpose and effect of the action are not to establish or confirm title in him, but, on the contrary, to give him the rents and profits which undermine and destroy his title. (United States Mortgage Co. v. Gross, 93 Ill. 483.) When the rents and profits have paid the mortgage debt, both the title and right of possession of the mortgagee are at an end. The mortgagor's interest in the land may be sold upon execution; his widow is entitled to dower in it; it passes as real estate by devise; it descends to his heirs, by his death, as real estate; he is a freeholder by virtue of it; he may maintain an action for the land against a stranger and the mortgage cannot be set up as a defense. The mortgagee has no such estate as can be sold on execution; his widow has no right to dower in it; upon his death the mortgage passes to his personal representatives as personal estate, and it passes by his will as personal property. (1 Jones on Mortgages, § 15.) The title of the

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mortgagee, even after condition broken, is not an outstanding title of which a stranger can take advantage, but it is available only to the mortgagee or one claiming under him. (Hall v. Lance, 25 Ill. 277.) The mortgagor may sell and convey his title or mortgage it to successive mortgagees, and his grantee or mortgagee will succeed to his estate and occupy his position subject to the encumbrance.

Fitch v. Pinckard, 4 Scam. 69, was an action of ejectment, and there was a question whether an equity of redemption was liable to execution and would pass to the purchaser at an execution sale. The court, holding that it would pass, said that the earliest doctrine in England settled that the whole legal estate was in the mortgagee, but that the strictness of the law has yielded to the principle of justice and equity, and the doctrine held in the United States in regard to the estate of the mortgagor is, that he is to be treated as the real owner of the estate for all beneficial purposes, subject only to the rights and encumbrance of the mortgagee.

Cottingham v. Springer, 88 Ill. 90, was also an action of ejectment, where the same question arose. The court cited Fitch v. Pinckard, *supra,* and reiterated what was there said. After referring to the common-law rule that the mortgagee held the legal title in fee and that the mere equitable right of the mortgagor could not be sold on execution, the court said (p. 93): "But many of the states—and ours of the number—have, by enactment, made great modifications of the rule. Our legislature at an early day provided that when the mortgagor paid and satisfied the debt and the mortgage had been recorded, he might compel the mortgagee to enter a satisfaction of the mortgage on the margin of the record, which should operate as a discharge and release of the same and forever bar all actions that might be brought thereon. This provision is found in the act establishing the recorder's office (Pub. Laws of 1819, p. 19, § 5) and has been continued in force ever since. This was a most material modification of the common-law rule, as it reinvested the mortgagor with the title simply by the mortgagee stating, over his signature, on the margin of the record, that he had received satisfaction of the debt, and dispensing with a release or reconveyance for the purpose." The court also said that the provision for a foreclosure at law by a *scire facias* and a sale of the property under an execution at law recognized the equity of redemption as an interest or title that might be sold on execution, subject to the same incidents that other sales of real estate are under when sold under ordinary executions at law.

In Barrett v. Hinckley, 124 Ill. 32, which was an action of ejectment by Hinckley against Barrett and others, the court held that the title of a mortgagee exists only for the benefit of the holder of the mortgage indebtedness, and can only be asserted by an ac-

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tion in furtherance of his interest as a means of coercing the payment of the debt; that if a mortgagee conveys the mortgaged premises without assigning the debt, the grantee will hold the legal title in trust for the holder of the debt, and that the mortgage interest, as distinct from the debt, has no determinate value and is no fit subject for assignment. The court also said (p. 46): "It must not be concluded from what we have said that the dual system respecting mortgages, as above explained, exists in this state precisely as it did in England prior to its adoption in this country, for such is not the case. It is a conceded fact that the equitable theory of a mortgage has, in process of time, made in this state, as in others, material encroachments upon the legal theory which is now fully recognized in courts of law. Thus, it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns. (Hall v. Lance,, 25 Ill. 250; Emory v. Keighan, 88 *id.* 482.) As a result of this doctrine, it follows that in ejectment by the mortgagor against a third party the defendant cannot defeat the action by showing an outstanding title in the mortgagee. (Hall v. Lance, *supra.*) So, too, courts of law now regard the title of a mortgagee in fee in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the Statute of Limitations, the mortgagee's title is extinguished by operation of law. (Pollock v. Maison, 41 Ill. 516; Harris v. Mills, 28 *id.* 44; Gibson v. Rees, 50 *id.* 383.) Hence the rule is as well established at law as it is in equity, that the debt is the principal thing and the mortgage an incident."

The mortgagee is the legal owner for only one purpose, while, at the same time, the mortgagor is the owner for every other purpose and against every other person. The title of the mortgagee is anomalous, and exists only between him and the mortgagor and for a limited purpose. Delano v. Bennett, 90 Ill. 533, was an action of ejectment. E. T. Warren, the owner of two-fifths of the land in controversy, mortgaged the same to the Kennebeck Bank of Maine. The bank conveyed said two-fifths to Benjamin Wales and others, and Delano claimed the same through *mesne* conveyances from the grantees of the bank. It was held that the deed from the bank purporting to convey this two-fifths interest did not convey anything, and the court said (p. 536): "The mortgage is deemed a mere incident to the mortgage debt, and the conveyance of the interest of the mortgagee in the land without an assignment of the debt is considered in law as a nullity." The title is never out of the mortgagor, except as between him and the mortgagee and as an incident of the mortgage debt, for the purpose of obtaining satisfaction. When the debt is barred by the Statute of Limita-

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tions the title of the mortgagee or trustee ceases at law as well as in equity. When the debt, the principal thing, is gone, the incident, the mortgage, is also gone. (Pollock v. Maison, 41 Ill. 516.) The mortgagor's title is then freed from the title of the mortgagee, and he is the owner of the premises, not by any new title, but by the title which he always had. Statutes of limitation do not transfer title from one to another, and a Statute of Limitations which would have the effect of transferring the legal title back from the mortgagee to the mortgagor would be unconstitutional. (Newland v. Marsh, 19 Ill. 376.) The title of the mortgagor becomes perfect because the title of the mortgagee is measured by the existence of the mortgage debt or obligation and terminates with it. (Barrett v. Hinckley, *supra.*)[18]

RUNYAN v. MERSEREAU.

SUPREME COURT OF NEW YORK, 1814.
11 Johns. (N. Y.) 534.

Per Curiam. This was an action of trespass, *quare clausum fregit.* The plaintiff proved himself in possession of the *locus in quo,* and showed a title derived under a judgment against one James Leonard, who, it appeared, had mortgaged the land to Joshua Mersereau. By the pleadings, the question presented to the court is, whether the freehold was in the plaintiff, who had purchased the equity of redemption, under the judgment against the mortgagor, or in Joshua Mersereau, the mortgagee.

Courts of law, both here and in England, have gone very far towards, if not the full length of, considering mortgages, at law, as in equity, mere securities for money; and the mortgagee as having only a chattel interest. Lord Mansfield (Doug. 610) says: A mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security; that it is an affront to common sense to say the mortgagor is not the real owner. Mortgages are not considered as conveyances of land within the statute of frauds, and the forgiving of the debt, with the delivery of the security, is holden to be an extinguishment of the mortgage. Mortgages will pass by a will not made with the solemnities of the statute of frauds. The assignment of the debt, or forgiving it, even by parol, draws the land after it as a consequence. The debt is considered the principal, and the land as an incident only.

The interest of the mortgagee cannot be sold under execution. It is unnecessary to go into an examination of the cases on this subject; they have been repeatedly reviewed by this court. (3

[18] Compare Woodside v. Adams, 40 N. J. L. 417. For an interesting analogy, see Williston, Sales, § 330.

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Johns. Cases 329, 1 Johns. Rep. 590, 4 Johns. Rep. 42.) The light in which mortgages have been considered, in order to be consistent, necessarily leads to the conclusion that the freehold must be considered in the plaintiff, and he, of course, is entitled to judgment.[19]

COMSTOCK, C. J., in KORTRIGHT v. CADY, 21 N. Y. 343, 362 (1860). In the early history of mortgage law, the courts of equity, departing from the letter of the contract, but adhering to the intention of the parties, adopted the just and liberal doctrine that a mortgage was but a pledge or security, always redeemable until foreclosure. The courts of law followed in the same direction. As Lord Redesdale observed (Mitf. 428): "The distinction between law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Such, preeminently, has been the course of jurisprudence on this subject. The doctrines originating in the courts of equity, respecting the rights of mortgagor and mortgagee, have been incorporated into the code of the common law, so that there is now no difference between the two systems. This has been true in substance for nearly a century past. In Martin v. Mowlin (2 Burr. 978), decided by the English King's Bench in 1760, it was held that whatever words in a will would carry the money due upon a mortgage would carry the interest in the land. Lord Mansfield said: "A mortgage is a charge upon the land, and whatever would give the money would carry the estate in the land along with it. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to the executor; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence; nay, it would do it though the debt were forgiven only by parol." So, in The King v. St. Michaels (Doug. 632), it was said by the same judge, that "a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security." To the same effect is The King v. Edington (1 East. 288), and such is the uniform tenor of the English authorities. (See 6 Conn. 159.)

In this state, the rules of law and equity in regard to mortgages have never differed in any degree; it being the doctrine of both systems that a mortgage is but a personal interest merely. This

[19] For earlier cases in New York, see Johnson v. Hart, 3 Johns. Cas. (N. Y.) 322; Jackson v. Willard, 4 Johns. (N. Y.) 41.

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proposition, in its full length and breadth, was determined in Runyan v. Mersereau (11 Johns. 534), where the question arose in the most direct manner whether the freehold was in the mortgagor or mortgagee. The plaintiff, deriving title under the mortgagor, sues in trespass for cutting timber; the defendant justifying under a license from the mortgagee. It was held that the action was maintainable; the decision being explicitly on the ground that the former was the real owner of the land, while the latter had a chattel interest only. So it has been held in repeated decisions that the mortgagee cannot, in any way, convey, devise, mortgage or incumber the land, while the mortgagor can do all these things; that judgments against a mortgagee, which are a lien on all legal estates, do not affect his interest in the lands mortgaged; that such an interest does not descend to heirs, but goes to the personal representative as a chose in action; that it is not subject to dower or curtesy; that it passes by a parol transfer, and by any transfer of the debt; and, finally, that it is extinguished by payment, or by whatever extinguishes the debt. (3 Johns. Cas. 329, 1 J. R. 590, 4 *id.* 42, 7 *id.* 278, 15 *id.* 319, 6 *id.* 290, 2 Paige 68, 586, 5 Wend. 603, 2 Barb. Ch. 119.)

But it has been said that the mortgagee could maintain ejectment against the mortgagor, until our Revised Statutes abolished that remedy in such a case, and that even since those statutes, the mortgagee, being in possession, may retain it until the debt is paid. All this is true; but it presents no anomaly or inconsistency in the law. The mortgagee's right to bring ejectment or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or to retain the possession of the pledge for the purpose of paying the debt. (6 Conn. 163.) Such a right is but the incident of the debt, and has no relation to a title or estate in the lands. Any contract for the possession of lands, however transient or limited, will carry the right to recover that possession; and such was deemed to be the nature and construction of a mortgage, it being considered that the parties intended the possession of the thing hypothecated should go with the contract. Ejectment was not, in fact, a real action at the common law. That remedy, in its origin, was only to recover possession according to some temporary right; and it was only by the use of fictions that the title was at length allowed to be brought into controversy. (3 Bl. 199, 200.) When the legislature, by express enactment, denied this remedy to mortgagees, they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law which regarded a mortgage as a conveyance of the freehold; yet I see nothing inconsistent or anomalous in allowing the possession, once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished.

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When that purpose is attained, the possessory right instantly ceases, and the title is, as before, in the mortgagor, without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagee, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge; but when its object is accomplished, it is neither just nor lawful for an instant longer.

There are terms of the ancient law which have come down to us, having long survived the principles of which they were the appropriate expression. Thus the words "law day" once, and very expressively, marked the time when all legal rights were lost and gone, by the mortgagor's default. There is now no such time until foreclosure by a judicial sentence or sale under a power. But the term is still in use, serving no other purpose than to engender confusion and uncertainty in minds which derive their conceptions from words rather than things. So we have the terms, "redemption" and "equity of redemption," which belonged to a system of law that gave the legal estate, defeasibly before default and absolutely afterwards, to the mortgagee, and which, while that system prevailed, were descriptive of the mortgagor's right to go into equity, on the condition of paying his debt, to redeem a forfeited estate and demand a reconveyance. These descriptive words yet survive, and are in use, although the ideas they once represented have long since become obsolete. Even the word "forfeiture," still so often used, is no longer, in reference to this subject, the expression of any principle, as it once was. There is now no forfeiture of a mortgaged estate. The mortgagor's rights may be foreclosed by a sentence in the courts, or by a sale had in the manner prescribed by the statute law, if he has himself, in the contract, given authority thus to sell; but, until foreclosure, his estate, the day after a default, is exactly what it was the day before. Controversies like the present would cease to arise, if the mere terms of the law were no longer confounded with its principles.

The proposition, that a tender of the money due on a mortgage, made at any time before a foreclosure, discharges the lien, is the logical result of premises which are admitted to be true. These are, that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the incumbrance; and that payment being actually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender, which is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or

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securities. (3 Johns. Cas. 243, 12 J. R. 274, 6 Wend. 22, 6 Cow. 728; Coggs v. Bernard, 2 Lord Ray. R. 916.) Thus, after the tender of a money debt, followed by payment into court, interest and costs cannot be recovered. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or the right of distress. It is not denied that the same principle applies to a mortgage, if the tender be made at the very time when the money is due. If the creditor refuses, he justly loses his security. It is impossible to hold otherwise although the tender be made afterwards, unless we also say that the mortgage, which was before a mere security, becomes a freehold estate by reason of the default. That this is not true has been sufficiently shown.

CHRISTIANCY, J., in LADUE v. DETROIT & MILWAUKEE RAILROAD Co., 13 Mich. 380, 394 (1865). That a mortgage in this state, both at law and in equity, even when given to secure a debt actually subsisting at its date, conveys no title to the land to the mortgagee (especially since the statute of 1843, taking away ejectment by the mortgagee); that the title remains in the mortgagor until foreclosure and sale, and that the mortgage is but a security, in the nature of a specific lien, for the debt has been already settled by the decisions of this court: Dougherty v. Randall, 3 Mich. 581; Caruthers v. Humphrey, 12 Mich. 270; and Crippen v. Morrison, to be reported in 13 Mich. This is in accordance with the well settled law of the state of New York, from which our system of law in regard to mortgages has been, in a great measure, derived: Jackson v. Willard et al., 4 Johns. 41; Collins v. Torrey, 7 Johns. 278; Runyan v. Mersereau, 11 Johns. 534; Gardner v. Heart, 3 Denio 232; Edwards v. Ins. Co., 21 Wend. 467; Waring v. Smyth, 2 Barb. Ch. 119; Bryan v. Butts, 27 Barb. 504; The Syracuse City Bank v. Tallman, 31 Barb. 201; Cortwright v. Cady, 21 N. Y. 343.

This view of a mortgage is also sustained by several of the English decisions, and substantially this is the more generally received American doctrine, as will sufficiently appear by reference to the decisions, most of which have been carefully collected in the elaborate brief of the defendant's counsel, but which are too numerous to be cited here. There are exceptions and peculiarities in particular states, in some of which, as in some of the New England states and Kentucky, the old idea of an estate upon a condition continues to rankle in the law of mortgages, like a foreign substance in the living organism, but is rapidly being eliminated and thrown off by the healthy action of the courts under a more vigorous application of plain common sense. But few of the incidents of this antiquated doctrine are now recognized in most of the states of this Union, the title, for nearly all practical purposes, being now recognized, both at law and in equity, as continuing in

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the mortgagor, and the mortgage as a mere lien for the security of the debt. But wherever any vestige of this now nearly exploded idea continues to prevail in connection with the more liberal doctrines of modern times which the courts have been compelled, from time to time, to adopt, it serves only to confuse and deform the law of mortgages by various anomalies and inconsistencies, making it a chaos of arbitrary and discordant rules resting upon no broad or just principle; while, by recognizing the mortgage as a mere lien for the security of the debt, at law as well as in equity, and thus giving it effect according to the real understanding and intention of the parties, the law of mortgages becomes at once a system of homogeneous principles, easily understood and applied, and just in their operation.

A mortgage, then, being a mere security for the debt or liability secured by it, it necessarily results, 1st, That the debt or liability secured is the principal, and the mortgage but an incident or accessory. See cases above cited; also, Richards v. Synes, Barnadiston's Ch. R. 90; Roath v. Smith, 5 Conn. 133; Lucas v. Harris, 20 Ill. 165; Vansant v. Allmon, 23 Ill. 30; Ord v. McKee, 5 Cal. 515; Ellison v. Daniels, 11 N. H. 274; Hughes v. Edwards, 9 Wheat 489; Green v. Hart, 1 Johns. 580; McGan v. Marshall, 7 Humph. 121; 4 Kent's Com. 193; McMillan v. Richards, 9 Cal. 365.

2d. That anything which transfers the debt (though by parol or mere delivery), transfers the mortgage with it, see cases above cited, especially Vansant v. Allmon, 23 Ill. 30; Ord v McKee, 5 Cal. 515; Ellison v. Daniels, 11 N. H. 274. See also, Martin v. Mowlin, 2 Burr. 987; Clark v. Beach, 6 Conn. 164; Southern v. Mendurn, 5 N. H. 420; Wilson v. Kimball, 27 *id.* 300, 36 N. H. 39; Crowl v. Vance, 4 Iowa 434, I Blackf. 137, 5 Cow. 202, 9 Wend. 410, 1 Johns. 580.

3d. That an assignment of the mortgage without the debt is a mere nullity: Ellison v. Daniels, 11 N. H. 274; Jackson v. Bronson, 19 Johns. 325; Wilson v. Throop, 2 Cow. 195; Weeks v. Eaton, 15 N. H. 145; Peters v. Jamestown Bridge Co., 5 Cal. 334; Webb v. Flanders, 32 Me. 175, 4 Kent's Com., *ubi supra;* Thayer et al. v. Campbell et al., 9 Mo. 277.

4th. That payment, release, or anything which extinguishes the debt, *ipso facto* extinguishes the mortgage: Lane v. Shears, 1 Wend. 433; Sherman v. Sherman, 3 Ind. 337; Ryan v. Dunlap, 17 Ill. 40; Armitage v. Wickliffe, 12 B. Monroe 496; Paxon v. Paul, 3 Harris & McH. 399; Perkins v. Dibble, 10 Ohio 434; Breckenridge v. Ormsby, 1 J. J. Marsh 257; Cameron v. Irwin, 5 Hill 272. (It will be seen from these authorities that some, if not all, of these incidents or characteristics of a mortgage are recognized by some of the courts which still hold the mortgage to be a conveyance of the estate—an idea, however, with which they are ut-

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terly inconsistent, as such incidents can only logically flow from the doctrine that the estate still remains in the mortgagor, and that the mortgage is but a lien for security of a debt.)

BEARDSLEY, J., in GARDNER v. HEARTT, 3 Denio 232 (N. Y. S. Ct. 1846). A mortgage creates a specific lien on the land mortgaged, as a judgment duly docketed does a general one on the land of the judgment debtor. But the mortgagee, as such, has no title to the land mortgaged: he has neither *jus in re* nor *ad rem*, but a mere security for his debt; title to the land, notwithstanding the mortgage, remaining in the mortgagor.[20]

SIMPSON v. DEL HOYO.

COURT OF APPEALS OF NEW YORK, 1883.
94 N. Y. 189.

EARL, J. In October, 1877, Mrs. Del Hoyo, being the owner of certain real estate in the city of New York, was induced, by false pretenses and fraudulent representations of Henry M. Lowenstein, to convey such real estate to his daughter, Rosa H. Lowenstein. Thereafter she, upon some alleged consideration passing to her from her father, executed to him a mortgage upon the same real estate to secure the payment of $1,000, which was collateral security for the payment of her bond for the same amount. Subsequently he assigned the bond and mortgage to this plaintiff who, as we must assume upon this appeal, paid value for the same, acting in good faith, with no knowledge whatever of the fraud committed upon Mrs. Del Hoyo, or of her equities. Subsequently to the execution and assignment of the mortgage, Miss Lowenstein reconveyed the land to Mrs. Del Hoyo. This action was to foreclose the mortgage; and Mrs. Del Hoyo in her answer alleged the fraud perpetrated upon her by Lowenstein as a defense to the action.

It must be conceded that if Lowenstein himself had continued to hold the mortgage, and were plaintiff in this action attempting to foreclose the same, Mrs. Del Hoyo would have a good defense; and her defense has thus far been sustained upon the ground that the plaintiff as assignee could have no better right or position as against her than Lowenstein, the assignor, could have had. The courts below applied to this case the familiar rule that the purchaser of a non-negotiable chose in action takes it subject to all the equities existing between the original parties thereto, not only, but to all the latent equities of third persons. The general rule of law, as thus stated, has been many times announced in the de-

[20] Compare Verner v. Betz, 46 N. J. Eq. 256.

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cisions of this court and cannot be disputed. But it has its exceptions, and we do not think it is applicable to this case.

Mrs. Del Hoyo conveyed the real estate to Miss Lowenstein by an absolute deed with full covenants, thus conferring upon her the apparent title and ownership of the property, and under that conveyance she took possession of the property, and was in the possession thereof at the time of the execution of the mortgage, and of its assignment to the plaintiff. Mrs. Del Hoyo thus clothed her grantee with the apparent right to deal with the property as owner. She could have conveyed the property to a bona fide purchaser, and he would have taken a title, good as against her and against her grantor, Mrs. Del Hoyo.

When real or personal property is obtained from one by fraud upon the purchase thereof, and the vendor thus intentionally parts with the title, the vendee can always, by a sale to a bona fide purchaser for value, give a title good as against the vendor. If Miss Lowenstein could give a conveyance, good as against her grantor, she could execute a mortgage to one parting with value, and taking it in good faith, which would be equally effectual, as she could have done if the property had been personal instead of real. So if this mortgage to her father had been taken by him for value, and in good faith, he could have enforced the same against the land.

The assignee of the mortgage holds under Miss Lowenstein. He took it on the faith that she, as the apparent owner of the real estate, had the right to execute it. When he took it he could inquire of her whether it was valid and effectual, she at the time having the legal title to the land; and when his inquiries had extended thus far he was bound to go no further.

It would lead to great inconvenience and great insecurity if persons taking or purchasing mortgages were obliged to go back of the mortgagor who owned the land and had the record title thereto, and at their peril ascertain whether any fraud had been perpetrated upon some prior owner of the land.

This mortgage was not purchased on the faith or credit of the assignor. He did not even guarantee the payment of the same, but it was bought on the faith and credit of the mortgagor's title. In such a case, as against the plaintiff, an innocent bona fide purchaser of the mortgage, Mrs. Del Hoyo is estopped from denying the title of her grantee, and her right to deal with the property as owner. For this conclusion the cases of McNeil v. Tenth National Bank (46 N. Y. 335, 7 Am. Rep. 341), Moore v. Metropolitan National Bank (55 N. Y. 41, 14 Am. Rep. 173), and Greene v. Warnick, (64 N. Y. 220) furnish ample authority.

But without invoking the rule of law announced in the cases cited, there is another ground upon which our decision may rest.

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It is a familiar rule of law that a fraudulent purchaser of real or personal property obtains the legal title to the property purchased, and that he may convey a good title to any bona fide purchaser from him for value. He may not only convey the property, but he may deal with it as owner, and may mortgage it; and whoever purchases the property or takes a mortgage thereon from him or under him, in good faith, for value, or deals with him in good faith in reference thereto will be protected against the claims of the defrauded vendor. The real estate may be conveyed, or a mortgage thereon may be assigned to several successive participants in the fraud, or several successive mala fide purchasers. But the moment the real estate or the mortgage reaches the hands of a bona fide purchaser for value, the rights and equities of the defrauded owner are cut off. (Bumpus v. Platner, 1 Johns. Ch. 213; Demarest v. Wynkoop, 3 *id.* 129; Griffith v. Griffith, 9 Paige 315; Smart v. Bement, 4 Abb. Ct. App. Dec. 253; Paddon v. Taylor, 44 N. Y. 371.)

The trial judge held that it was immaterial to determine whether or not the plaintiff was an innocent purchaser of the mortgage for value. In this, as we have seen, he erred. Upon the new trial, the fraud being established, it will be incumbent upon the plaintiff to show satisfactorily how he came by the mortgage, and that he took the same for value; and, in order to give him the protection of the principles of law we lay down, the court must find, not only that he purchased the mortgage for value, but that he purchased it innocently and in good faith.

Mrs. Del Hoyo claims a right to be subrogated to an interest in a mortgage for $10,000, which was a lien upon the real estate at the time of the conveyance by her and until after the reconveyance to her, for the amounts paid by her upon that mortgage in ignorance of plaintiff's mortgage. This claim is, upon the facts found by the court, well founded, and may be allowed and adjusted upon the new trial, in case she fails entirely to defeat plaintiff's mortgage. (Barnes v. Mott, 64 N. Y. 397, 21 Am. Rep. 625; Green v. Milbank, 3 Abb. N. C. 138; Snelling v. McIntyre, 6 *id.* 469.)

Mrs. Del Hoyo seems to have been greatly wronged, and should have all the relief any rule of law can give her without violating the rights of any other person equally innocent with her.

The judgment should be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.[21]

[21] See also Parker v. Barnsville Savings Bank, 107 Ga. 650; Ely v. Scofield, 35 Barb. (N. Y.) 330; Fallas v. Pierce, 30 Wis. 443, 454. See 10 Mich. L. Rev. 587; 11 Mich. L. Rev. 495. Compare Wood v. Holly Co., 100 Ala. 326, 351.

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HUBBELL v. MOULSON.

COURT OF APPEALS OF NEW YORK, 1873.
53 N. Y. 225.

ANDREWS, J. The plaintiffs claim title under Alfred Hubbell, the mortgagor, to the undivided half of premises mortgaged by him to Hiram Sibley, December 1, 1846, to secure the payment of $7,000. The action is ejectment, and it was necessary for the plaintiffs, in order to recover under their complaint, to show that they were entitled, as against the defendants, to the possession of the premises at the time of the commencement of this action. The defendants are the grantees of Sibly, the mortgagee, under a deed dated June 7, 1849, and are in possession, claiming under that deed. They stand, by reason of that conveyance, in privity with the mortgagee, and their right to the possession is the right of the mortgagee, and the right of the plaintiffs depends upon the same principles as if Sibley was in possession and the action had been brought against him. (Jackson v. Mueller, 10 J. R. 479; Jackson v. Bowen, 7 Cow. 13; Robinson v. Ryan, 25 N. Y. 320.) The plaintiffs on the trial offered to prove that the mortgage debt had been paid by the receipt by Sibley, before the commencement of the action, of rents and profits from the land sufficient to satisfy it. The evidence was excluded. If the mortgage was in law subsisting and unsatisfied when this action was commenced, then it cannot be maintained, as the authorities are decisive that ejectment will not lie by a mortgagor against a mortgagee in possession. (VanDuyne v. Thayre, 14 Wend. 233; Phuyfe v. Riley, 15 Wend. 248; Pell v. Ulmar, 18 N. Y. 139). Leaving out of view the alleged title under the statute foreclosure, the question arises whether the receipt by a mortgagee in possession of rents and profits sufficient to satisfy the mortgage debt, does *ipso facto* extinguish it and discharge the lien of the mortgage. If it does not, then the evidence was properly excluded. If admitted, it would not have shown a right in the plaintiffs to the possession of the premises when the action was brought.

It is the settled doctrine in this state that a mortgagee has by virtue of his mortgage a lien only, and not an estate in the land mortgaged. (Runyan v. Mersereau, 11 J. R. 537; Jackson v. Craft, 18 *id.* 110; Jackson v. Bronson, 19 *id.* 325; Kortright v. Cady, 21 N. Y. 243; Stoddard v. Hart, 23 *id.* 560.) In harmony with this view it was held in Kortright v. Cady that a tender of the mortgage debt after it became due discharged the lien of the mortgage and prevented a subsequent foreclosure. And it was held in Edwards v. The Firemen's Fire Ins. and Loan Co. (21 Wend. 467, 26 *id.* 541) that upon a tender after default by a mortgagor of the

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mortgage debt, ejectment would lie in his favor upon the refusal of the mortgagee to surrender the possession. But while no title in a strict sense vests in the mortgagee of land until foreclosure, yet his interest is in some cases treated and regarded as a title, for the purpose of protecting and enforcing the equities between parties. An instance of this is found in Mickles v. Townsend (18 N. Y. 575), where it was so held for the purpose of applying the doctrine of estoppel by deed against a person claiming as assignee of a mortgage, which existed at the time of his prior conveyance of the mortgaged premises with warranty but which was assigned to him afterward. And in Van Duyne v. Thayre (19 Wend. 162) the release of the equity of redemption by the mortgagor to the mortgagee was held to inure as an enlargement of the estate of the mortgagee so as to prevent the plaintiff's recovering dower at law, in disregard of the equity of the defendant to have the mortgage first satisfied out of the land. (Cowen, J., 21 Wend. 485.)

It is easy to see that where the English doctrine prevails, that the mortgage conveys a legal title to the mortgaged premises, the right of the mortgagor to an account of the rents and profits of the land received by the mortgagee is purely and exclusively of equitable cognizance. At law, the mortgagee is the owner of the estate, and takes the rents and profits in that character. In equity, the mortgagor is regarded as the owner until foreclosure, and his right to an account is incident to his right of redemption. (2 Wash. on Real Property, 161, 205; Seaver v. Durant, 39 Vt. 103; Parson v. Welles, 17 Mass. 419.) But the necessity to resort to an accounting in equity, in order to have the rents and profits applied to the satisfaction of the mortgage, is not obviated by the fact that here the mortgagor retains the legal title. The mortgagee in possession takes the rents and profits in the *quasi* character of trustee or bailiff of the mortgagor. (2 Pow. on Mort. 946, a; 2 Wash. 205.) They are applied in equity as an equitable set-off to the amount due on the mortgage debt. (Ruckman v. Astor, 9 Paige 517.) The law does not apply them as received to the payment of the mortgage. It depends upon the result of an accounting upon equitable principles, whether any part of the rents and profits received shall be so applied. The mortgagee is entitled to have them applied, in the first instance, to reimburse him for taxes and necessary repairs made upon the premises; for sums paid by him upon prior incumbrances upon the estate, in order to protect the title, and for costs in defending it; and if he has made permanent improvements upon the land, in the belief that he was the absolute owner, the increased value by reason thereof may be allowed him. So he may be charged with rents and profits he might have received, if his failure to recover them is attributable to his fraud or willful default. (2 Powell on Mort. 957, note; 4 Kent 185,

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2 Wash. 218; Cameron v. Irwin, 5 Hill 272; Mickles v. Dillaye, 17 N. Y. 80.) In many cases complicated equities must be determined and adjusted before it can be ascertained what part, if any, of the rents and profits received is to be applied upon the mortgage debt. In the absence of an agreement between the parties there is no legal satisfaction of the mortgage by the receipt of rents and profits by a mortgagee in possession to an amount sufficient to satisfy it, and his character as mortgagee in possession is not divested until they are applied by the judgment of the court in satisfaction of the mortgage. These considerations lead to an affirmance of the judgment without considering the question of the validity of the statute foreclosure.

The plaintiff's claim to recover upon the allegation of a right to the possession of the premises when the action was commenced. The defendants were in possession, claiming under the mortgagee, whose mortgage was outstanding and unsatisfied. The action is not for a redemption or for an accounting, and the plaintiffs are not in the attitude of resisting an attempt by the mortgagee to enforce the mortgage.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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CHAPTER II.

ESSENTIAL ELEMENTS OF THE MORTGAGE.

SECTION 1.—THE FORM.

(a) LEGAL MORTGAGES.

JONES, MORTGAGES, § 60. The term "mortgage" has a technical signification at law, and is descriptive of an instrument having all the requisites necessary to establish it in a court of law, as distinguished from that which may be so regarded in a court of equity. A mortgage which only a court of equity will recognize is properly designated an "equitable mortgage."[1]

TIFFANY, REAL PROPERTY, § 510. A mortgage, being a conveyance of, or a contract concerning, an interest in land, must, under the Statute of Frauds, be in writing.[2] Though, as before shown, the view that a mortgage is a lien merely has for most purposes displaced the view that it is an estate on condition, the old form of conveyance on condition is usually retained.[3] In states where

[1] While it is certain that there are some requisites of form for a legal mortgage, it is very difficult to say just what they are. There have not been many cases testing this question, a circumstance which may be explained by the following considerations (1) in the vast majority of cases, mortgages are drawn by lawyers upon carefully perpared legal blanks and a superabundance of form is used; (2) in the small number of cases in which the standard forms are departed from, litigation arising thereon is, in the vast majority of cases, by equitable suit, in which the distinction between legal and equitable mortgages is usually immaterial.

Of course the same considerations which make authorities on this question scarce, make the question relatively unimportant.

[2] Difficult questions under the Statute of Frauds arise in cases where parties have attempted by parol to revive a mortgage which has been paid (see Jones, §§ 362, 943-948), or to extend the security of a mortgage to a debt other than that described in the mortgage (see Jones, §§ 357, 947). See also, application of the Statute to informal equitable mortgages, post.

[3] The following typical form is taken from Jones, Legal Forms, 503, where it is presented as a standard form in Colorado, a lien state.

"This indenture, made this_____day of_____, 19____, between_____, of the first part, and _____, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of

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the legal theory still obtains, conformity with the essentials of a conveyance is essential in order that the instrument may be sufficient to vest the legal title in the mortgagee, and the omission of the words of inheritance necessary in a conveyance in fee simple will have the effect of reducing the estate of the mortgagee to one for life only. In states where the equitable theory of a mortgage prevails, there is no necessity that the instrument have the essentials of a conveyance, it being sufficient that the instrument show an intention to mortgage, and that it be executed as required by the statute. The statute quite frequently authorizes a simple and concise form, stating the bare essentials of a mortgage, and it is, of course, sufficient if this be followed.

The mortgaged land must always be described in the mortgage

----------dollars to----------in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell, convey and confirm, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, claim and demand which the said party of the first part has in and to the following described lot or parcel of land, namely:

"To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining; and all the estate, right, title, interest, and claim whatsoever, of the said party of the first part, either in law or equity, to the proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever. And the said party of the first part, the aforesaid tract or parcel of land and premises unto the said party of the second part, his heirs and assigns, against the claim or claims of all and every person whomsoever, does and will warrant and forever defend by these presents.

"Provided always, that these presents are upon this express condition, that if the said party of the first part, his heirs, executors or administrators, shall well and truly pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators, or assigns, the sum of ----------dollars in manner particularly specified in a certain promissory note bearing even date herewith, executed by the said party of the first part to the said party of the second part, then and thenceforth these presents, and everything herein contained, shall cease and be void, everything herein contained to the contrary notwithstanding.

"In witness," etc.

There is, of course, much variation upon the basic theme of conveyance and condition, which, apart from the matter of mere style, consists in the addition of clauses and stipulations which do not change the fundamental nature of the mortgage but merely superadd special conditions or covenants. Some of the more usual stipulations of this sort will be noted hereinafter.

In England, perhaps the commonest form of mortgage is the mortgage for years, which differs from our typical mortgage, in the substitution, for the grant in fee, of a lease for years, usually a very long term. The condition is the same as in a mortgage in fee. This form of mortgage, while not unknown with us (e. g. Nugent v. Riley, 1 Metc. (Mass.) 117), is exceedingly rare.

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with sufficient particularity to enable it to be identified, as in the case of any other conveyance, but a reference to another instrument, in which the property is described, is sufficient for this purpose.

The requisites as to execution are ordinarily expressly named in the statute. An acknowledgment is usually requisite, as in the case of absolute transfers of land, only as a preliminary to the record of the conveyance.[4]

A mortgage must be delivered as if an absolute conveyance, and there are a number of decisions to the effect that the mortgage must be accepted by the mortgagee, and that, until such acceptance, other persons may acquire rights in the premises, as by judgment or attachment liens, which will take precedence of the unaccepted mortgage.

* * * * * * *

§ 511. Though the condition or proviso that the conveyance shall be void in case of compliance by the mortgagor with his contract, termed the "defeasance," is usually inserted in the conveyance to the mortgagee, this is not, in most jurisdictions, necessary, and it may be contained in a separate instrument. This practice has, however, been criticised, as liable to be productive of injury to the mortgagor.

In order that a mortgage with a separate defeasance be effective as such at law, it is necessary that the two instruments be delivered at approximately the same time, or at least that they be parts of the same transaction. Likewise, in order to create a mortgage valid at law as well as in equity, the defeasance must be of as high a nature as the conveyance itself,—that is, if the latter is under seal, the defeasance must likewise be under seal, so that it may be regarded as a part of the same instrument, and it must be executed with the other formalities required in the case of a conveyance of land.[5]

[4] The same thing is true of attestation by witnesses.

Mortgages are subject to the same requirements as deeds as to execution by a wife to relinquish dower or homestead.

[5] The doctrine stated in the text represents one extreme, the other being that a deed absolute which is shown by parol evidence to have been intended as a security is a legal mortgage, and therefore does not pass the title but merely creates a lien. Taylor v. McLain, 64 Cal. 514 (overruling Hughes v. Davis, 40 Cal. 117, which had overruled Jackson v. Lodge, 36 Cal. 28—there are over a dozen decisions from the Supreme Court of California dealing with this question); Odell v. Montross, 68 N. Y. 499; Adair v. Adair, 22 Ore. 115; Howe v. Carpenter, 49 Wis. 697; (semble).

This sort of transaction has almost universally been accepted without question as falling short of the requirements for legal mortgages and,

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The defeasance should be recorded with the absolute conveyance. In some states it is provided that, if the defeasance be not recorded, the grantee shall take nothing under the conveyance, or shall derive no benefit from the record of the conveyance, while in others it is provided that, in such case, the conveyance shall pass an absolute title, except as against the maker of the instrument, his heirs and devisees, and, usually, persons having actual notice of the instrument of defeasance, which is the rule in the absence of any statute on the subject. In the first class of states, therefore, it is to the advantage of the mortgagee to see that the defeasance is recorded, while in the latter class, the mortgagor or those claiming under him can alone suffer from the absence of the defeasance from the record.

JONES, MORTGAGES, § 62. A deed of trust to secure a debt is in legal effect a mortgage. It is a conveyance made to a person other than the creditor, conditioned to be void if the debt be paid at a certain time, but if not paid that the grantee may sell the land and apply the proceeds to the extinguishment of the debt, paying over the surplus to the grantor. The addition of the power of sale does not change the character of the instrument any more than it does when contained in a mortgage. Such a deed has all the essential elements of a mortgage; it is a conveyance of land as security for a debt. It passes the legal title just as a mortgage does, except in those states where the natural effect of a conveyance is controlled by statute; and in states where a mortgage is considered merely as a security, and not a conveyance, a trust deed is apt to be regarded in this respect just like a mortgage.[6] Both instruments convey a defeasible title only; the mortgagee's or trustee's title in fee being in the nature of a base or determinable fee; and the right to redeem is the same in one case as it is in the other. The only important difference between them is, that in

therefore, as passing the complete title at law, whether or not it was in equity a mortgage.

Even where it is held that parol evidence is admissible at law to show that an absolute deed is a mortgage, this does not necessarily make it a legal mortgage or prevent the title from passing. German Ins. Co. v. Gibe, 162 Ill. 251; McAnnulty v. Seick, 59 Iowa 586; Haggerty v. Brower, 105 Iowa 395.

[6] The minority view that a trust mortgage passes the legal title, although an ordinary mortgage does not, is maintained in Sacramento Bank v. Alcorn, 121 Cal. 379 (compare the California doctrine presented in the previous note); Stephens v. Clay, 17 Colo. 489; Soutter v. Miller, 15 Fla. 625. The trust mortgage is almost universally used when it is desired to secure a series of notes or bonds payable to, or designed to be transferred to different persons, as in the case of the common corporate bond issue.

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the one case the conveyance is directly to the creditor, while in the other it is to a third person for his benefit.

TIFFANY, REAL PROPERTY, § 513. A mortgage is usually given to secure the payment of a sum of money, and the debt is usually evidenced by a note, bond, or other instrument, separate from the mortgage, though this is not necessary.

* * * * * * *

A mortgage given to secure a debt existent at the making of the mortgage, or contemporaneous therewith, is valid, even as against subsequent purchasers and creditors, although it does not explicitly state the amount of such debt or liability, provided there are means of ascertaining such amount.[7] And extrinsic evidence is admissible for the purpose of showing the debt which the mortgage was intended to secure. The statement in the mortgage as to the sum secured is not conclusive in that regard, and it may be shown by the mortgagor that the lien was for a less sum, or even that the mortgage was not a lien for the payment of money, as stated therein, but was given for a different purpose.

A mortgage which is in terms security for a certain amount cannot, as against third persons, be extended by agreement between the mortgagor and mortgagee so as to cover sums subsequently advanced by the latter to the former. But, as between the parties to the mortgage, a written agreement, made after its execution, that it shall be security for a debt other than that which it was first intended to secure, is effective, this constituting in effect an equitable lien on the land for such additional sum.

(b) EQUITABLE MORTGAGES.

JONES, MORTGAGES, § 162. It has been noticed that a conveyance, accompanied by a condition contained either in the deed itself or in a separate instrument executed at the same time, constitutes a legal mortgage, or a mortgage at common law. In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts which are wanting in one or both of these characteristics of a common-law mortgage are often used by parties for the purpose of pledging real property, or some

[7] There is some conflict of authority as to the extent to which a mortgage, securing an existent and ascertained debt, must disclose its amount—See cases cited in Jones, §344.

As to the description of the debt in a mortgage to secure future advances, see post, Chap. II, Sec. 3.

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interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are therefore called equitable mortgages.

BRIDGEPORT ICE CO. v. MEADER.

UNITED STATES CIRCUIT COURT OF APPEALS, 1895.
72 Fed. 115.

[Suit in equity to foreclose an equitable mortgage. One Soulard was the promoter of the defendant, the Bridgeport Ice Co. On May 7, 1891, he contracted with plaintiff for the purchase of a machine for the manufacture of ice. It was stipulated in writing that the Ice Company should pay plaintiff the sum of $23,000, as follows: $5,750 on delivery, $5,750 when it had withstood fifteen days' test, the balance in negotiable notes, of certain terms, which, it was stipulated, should be secured by a mortgage of the machine, and of the buildings and real estate on which it was to be erected, or by personal endorsements satisfactory to plaintiff. The machine was delivered in May, 1891, and was accepted by defendant in April, 1892. In September, 1891, the defendant corporation was organized and, in October, its directors ratified the contract made by Soulard with plaintiff and issued promissory notes to plaintiff for the amount remaining unpaid thereon, but the mortgage stipulated for was never executed, nor was personal security satisfactory to plaintiff given. The defendant is insolvent.]

SPEER, J. * * * * * * * *

On the hearing, the circuit court of the Northern District of Alabama (the Honorable Alex. Boarman, judge presiding), decreed that the plaintiff was entitled to a lien for the balance due him; that the lien should relate back to and commence from the date of the original contract, to wit, May 17, 1891; that the amount due of the purchase-price on the ice machine was $11,385.87, with interest from the 26th day of April, 1893. And upon the failure of the defendant to pay this debt, with interest and costs, within thirty days from the enrollment of the decree, it was ordered that a special master, appointed in the decree, should sell the property on which the lien was established at public outcry, for cash, and for the satisfaction of the debt. From this decree the appeal is taken.

It is well settled that an agreement to give a mortgage, for a

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valuable consideration, upon property which is sufficiently specified, is in a court of equity regarded as the creation of the mortgage itself. This is held, for the reason that equity will treat that as done which ought to be done. 1 Jones, Mortg., § 163; Ketchum v. St. Louis, 101 U. S. 306; Gest v. Packwood, 39 Fed. 525; Will. Eq. Jur. pp 48, 298; O'Neil v. Seixas, 85 Ala. 80, 4 So. 745; 2 Story, Eq. Jur., § 1231. It is insisted, however, that the contract of the parties in this case was in the alternative,—that the purchaser had the right either to execute the mortgage in pursuance of the terms of the original contract of May 17, or that he might secure the debt by personal indorsement satisfactory to the vendor. It seems a sufficient reply to this to point out the fact that the defendant company made no offer of personal indorsement, satisfactory to the plaintiff, or otherwise, and the plaintiff was therefore remitted to such remedy for the total noncompliance with the contract as the doctrine above stated will afford him. With this view, he brings his bill, not, strictly to enforce the specific performance of the contract, but, rather, to have the court declare its legal effect, considered in connection with the further fact that the plaintiff has performed all that he agreed to do, and defendant, while receiving and accepting the ice machine, has not only not paid the debt, but even refused to give the evidence of the debt which it had promised. Nor is it a sufficient reply to this proceeding to say that, by suing at law, complainant waived his right to foreclose the equitable mortgage which the conduct of the parties had created. The owner of a note and a mortgage to secure the same can sue on the note, and thereafter foreclose the mortgage. The remedies of law and equity are concurrent for the enforcement of the demand. Nor did the plaintiff, after seeking this jurisdiction, while retaining his bill here, forfeit any of his powers by attempting, in the state courts of Alabama, to secure payment of the judgment which the circuit court of the United States at law had granted. It is true that he went through the forms of a purchase of the property in question by permission of the state court, but since the Supreme Court of Alabama afterward annulled and vacated this sale, it is now as if there had been no sale. Nor does it matter that the contract of the promoter of this corporation with the ice company preceded the creation of the company itself. After the ice company was organized, it was fully informed as to the terms of the contract. It received, tested, and accepted the machine, and paid a portion of the purchase money. It must, therefore, be held to have ratified the agreement of its promoter. "It is well settled that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not

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only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given with notice of the stipulation. Such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfill it." Pinch v. Anthony, 8 Allen 536.

* * * * * * *

Affirmed.[8]

LOVE v. SIERRA NEVADA MINING CO.

SUPREME COURT OF CALIFORNIA, 1867.
32 Cal. 639.

SHAFTER, J.: In the opinion delivered in this case on the former hearing, we considered "that it was unnecessary to determine whether the entire transaction was sufficient to constitute an equitable mortgage, for if such should be found to be the case it could not be enforced in the present state of the pleadings, because the decree must be based upon the allegations of the complaint; and it is alleged that the mortgage was executed by the corporation—that is to say, that it is a legal mortgage." Though there is an averment in the complaint that the mortgage, the foreclosure of which is sought in this action, was executed by the company, still the document is set forth in *haec verba,* and if it is not the mortgage of the defendant by legal as distinguished from equitable conclusion, the averment may be rejected as surplusage. We held in Stoddard v. Treadwell, 26 Cal. 303, that a contract may be declared on according to its legal effect or in *haec verba.* If the former mode should be adopted, then the defendant may, by the rule of the common law, in a proper case, crave oyer of the instrument; and if it appear that its provisions have been misstated, he may set out the contract in *haec verba* and demur on the ground of variance. But where a plaintiff himself sets forth the contract in the terms in which it is written, and then proceeds to put a false construction upon its terms, the allegation, as repugnant to the terms, should be regarded as surplusage, to be struck out on motion. *Utile per inutile non vitiatur.* From this it follows that if the complaint in this case discloses all the facts essential to an equitable mortgage binding upon the defendant, then, if the averments are true in fact, the plaintiff is entitled to the benefit of them.

[8] Accord: In re Howe, 1 Paige (N. Y.) 125; Carter v. Holman, 60 Mo. 498; Remington v. Higgins, 54 Cal. 620.

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And further, by the one hundred and forty-seventh section of the Practice Act, the court "may grant him any relief consistent with the case made by the complaint and embraced within the issue." We have re-examined the complaint in the light thrown upon it by the re-argument, and are satisfied that it contains all the facts essential to an equitable mortgage. As the facts averred are identical with the facts found or admitted, it is unnecessary to state the form in detail; for, in passing upon the legal effect of the finding, we must necessarily consider and pass upon the legal effect of the averments.

As the statement on motion for new trial does not specify the particulars in which the evidence is alleged to be insufficient, we must assume not only the facts admitted in the pleadings, but those also which are set forth in the findings. It appears from these two sources conjointly, that the defendant corporation on the 16th of April, 1860, by Josiah Bates and Samuel S. Atchinson, its trustees, duly authorized for that purpose, made and delivered to the plaintiff and four others, its promissory note for the sum of forty thousand pounds sterling, payable one day from the date thereof, with interest thereon from date until paid, at the rate of twenty per cent. per annum. That the consideration of said note was forty thousand pounds, loaned and advanced by the payees and others to the corporation before the date of the note. That to secure the payment of the note the corporation at the date thereof, by its said trustees, Bates and Atchinson, executed, acknowledged and delivered to the payees the "mortgage" set out in the complaint. In the indenture referred to the parties are described as "The Sierra Nevada Lake Water and Mining Company, a corporation, by their trustees, Josiah Bates and Samuel Atchinson, of the first part, and plaintiff (and the other payees in the note, naming them) parties of the second part." The conclusion of the indenture is as follows:

"In witness whereof the said parties of the first part have hereunto set their several hands and seals the day and year above written. "JOSIAH BATES, [Seal.]
"SAMUEL S. ATCHINSON." [Seal.]

The acknowledgment of the mortgage is to the effect that Bates and Atchinson were personally known to the notary as trustees of said corporation, and that they personally appeared and acknowledged each for himself that he executed the instrument for the uses and purposes therein mentioned "as and for the free act and deed of said Sierra Nevada Lake Water and Mining Company." At the execution of the note and mortgage Bates was president of the company, and Bates and Atchinson were a majority of the trustees; and at and before that time they agreed for and on

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behalf of said corporation with the said mortgagees to subscribe the name of "The Sierra Nevada Lake Water and Mining Company" to the said mortgage, and intended so to do, but failed by accident or mistake. The plaintiff was personally interested in the securities to the amount of twenty-four thousand eight hundred and forty-seven pounds sterling, with interest from the date of the note; and the other payees, Ridgway, F. and H. Wedgwood, and Robe, made defendants herein, refused to join as plaintiffs in this action. The remaining defendants are creditors of the Sierra Nevada Lake Water and Mining Company, having judgment liens on the property described in the mortgage, but subsequent thereto.

It is a rule of conveyancing long established, that deeds executed by an attorney or agent must be executed in the name of the constituent. It was so resolved in Coombes' Case (5 Coke 135, by Fraser), and the rule was recognized and applied by us in Echols v. Chenery, 28 Cal. 159. Tested by this rule, the instrument in suit is not a legal mortgage of the Sierra Nevada Lake Water and Mining Company. The paper is signed and sealed, not by the corporation, but by Bates and Atchinson, acting, so far as the signatures, seals and testatum clause throw any light upon the subject, for themselves and in their own right. Though the mortgage does not bind the company at law, it by no means follows, however, that it may not be asserted against it in equity. We consider it as settled that an agreement under seal, made by an attorney for his principal, though inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority; and if the instrument so defectively executed be a conveyance of real estate, it will be sustained in equity as an agreement to convey, and will be good against the principal, subsequent lien creditors and subsequent purchasers with notice. Or, more precisely stated, an agreement in writing to create a mortgage, or a mortgage defectively executed, or any imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien, which will have precedence of subsequent judgment creditors. (Am. Leading Cases 605; Leading Cases in Equity 666, and cases there cited.) The jurisdiction is sometimes put upon the ground that equity will aid the defective execution of a power—sometimes upon the jurisdiction to reform mistakes in written instruments, and sometimes upon the maxim that equity considers that as done which ought to be done. These different modes of expression all amount to the same thing in substance. It was held by this court in Beatty v. Clark, 20 Cal. 12, that "though equity will not aid the non-execution of a power, still, where a party undertakes to execute a power, and by mistake does it imperfectly, equity will, in favor of creditors and others

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peculiarly within its protective favor, aid the defective execution." We held in Bodley v. Ferguson, 30 Cal. 511, that a deed of land bad as a conveyance might be good in equity as a contract to convey; and that the equitable right to the legal title was as available for the purposes of defense in an action of ejectment, under our system, as the legal title. We held in Daggett v. Rankin, 31 Cal. 322, "that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate particular property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien upon the property so intended to be mortgaged." We considered further "that the maxim in equity upon which this doctrine rests is that equity looks upon things agreed to be done as actually performed; the true meaning of which is that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been. (See also Racouillat v. Sansevain, *ante,* 376.) The facts found or admitted in the case at bar bring it broadly within these principles. Bates and Atchinson were a majority of the board of trustees through which the corporate powers were to be executed. The corporation gave the note described in the complaint by Bates and Atchinson, they being duly authorized for that purpose; and they also agreed, "for and on behalf of the corporation," to give a mortgage collateral to the note, to which mortgage the name of the company was to be signed; and the failure to do so was the result of accident or mistake. The power being given, it is apparent on the face of the indenture that the trustees intended to act under the power in the matter of executing the mortgage. The corporation is named in the document as "party of the first part, by Josiah Bates and Samuel Atchinson, Trustees." The note which the mortgage was given to secure is described as a note made by the company. Furthermore, the trustees state in their acknowledgment that they executed the mortgage "as and for the free act and deed of said Sierra Nevada Lake Water and Mining Company."

It urged that the defective execution of the mortgage was caused by a mistake of law, and that therefore the defective execution can not be aided. The answer is that where there is a defective execution of a power, it is a matter of no equitable moment whether the error came of a mistake of law or a mistake of fact. It is enough that the power existed and that there was an attempt to act under it. The relief is not so much by way of reforming the instrument as by aiding its defective execution; which aid is administered through or by the application of the maxims already quoted. Or, as in the class of cases to which this belongs, the instrument defectively executed as a deed is considered as properly

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executed as a contract for a deed; and therefore as requiring neither reformation nor aid, but as ripe for enforcement according to the methods peculiar to courts of equity. Under our laws a contract for a mortgage need not be under seal; and when made through an attorney, his authority need not be evidenced by a sealed instrument. (Wood's Digest 106, § 6; Ang. & Ames on Corps. 193-266.) Though the indenture in this case is under the seals of the trustees, yet when considered as an agreement for a mortgage, it may be treated as a simple contract, nevertheless (Lawrence v. Taylor, 5 Hill 107; Worrall v. Munn, 1 Seld. 239; Wood v. A. & R. R. R. Co., 4 Seld. 167), and we consider it clear, from the authorities, that it is not indispensable, in order to bind the principal at law even, that such contract should be executed in the name and as the act of the principal. On the contrary, it will be sufficient, if upon the whole instrument it can be gathered from the terms thereof that the party described himself and acts as agent and intends thereby to bind his principals and not to bind himself. (Haskell v. Cornish, 13 Cal. 45; McDonald et al. v. Bear River and A. W. and Mining Company, 13 Cal. 221.)

The other objections taken by the appellants to the judgment, though not pressed in argument, have been fully considered by us, and they are all overruled.

Judgment affirmed.[9]

[9] Accord: White Water Val. Canal Co. v. Vallette, 21 How. (U. S.) 414 (stipulation in bonds that "the faith of the company and their effects real and personal are pledged," held to create equitable lien); Peckham v. Haddock, 36 Ill. 38 (a legal mortgage having been paid and discharged the owner of the land undertook to revive the same by a written but unsealed agreement—held not effective as a revivor at law for want of seal, but created equitable mortgage. "The surrounding circumstances render it evident that they intended to give Thompson a security upon the land; and the language employed by them should be construed, if it consistently can be, so as to effectuate that intention"); Pinch v. Anthony, 8 Allen (Mass.) 536 (agreement in writing to pay "out of the proceeds of the sale of said lands, if sold, or if lands shall not be sold, and a company is formed to work the mines, then to convey stock to that amount, it being understood that the foregoing amount is to be a charge on the estate of the owners," held to create equitable lien); Wayt v. Carwithen, 21 W. Va. 516 (M. having sold land to C. and subsequently recovered a judgment for the purchase-money, W. paid said judgment and C., by a writing reciting these facts, agreed that "Said W. shall be subrogated to the rights of said M. in reference to the lands aforesaid, and that he may retain the lien which said M. holds as vendor," held to create an equitable mortgage).

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JOHNSON v. JOHNSON.

COURT OF APPEALS OF MARYLAND, 1874.
40 Md. 189.

ALVEY, J. The late William Cost Johnson, by deed of the 14th of June, 1859, conveyed all his real and personal estate in Frederick county to the defendant in this cause, Thomas Johnson; the real estate consisting of a farm called "Harmony Grove." William Cost Johnson died in 1860; and for several years prior to his death, and up to April, 1868, the plaintiff, Edwin M. Johnson, occupied the farm; and after the death of his uncle, William Cost Johnson, he set up claim to the right of possession of the farm in respect of some pecuniary claims against his uncle, and also against his father, the defendant, who demanded possession of the farm by virtue of his title under the deed of the 14th of June, 1859. The defendant had advertised the farm for sale on the 21st of March, 1868, and the plaintiff filed his bill in equity in the circuit court for Frederick county, for an injunction to restrain such sale, and for a decree that the land be sold under the direction of the court for the satisfaction of his claims. In this state of contention in regard to the farm, the plaintiff and defendant entered into the agreement of the 6th of April, 1868, under their respective hands and seals. By this agreement the defendant promised and obligated himself to pay to the plaintiff the sum of two thousand five hundred dollars, in full satisfaction of all claims or demands whatever against him, the defendant; such sum to be paid in a specified manner, namely: Five hundred dollars on or before the expiration of thirty days from the date of the agreement; one thousand dollars out of the first payment made on the sale of the farm, "Harmony Grove;" and the other thousand dollars out of the second payment on said farm. The plaintiff, on his part, promised to give up and surrender to the defendant the immediate possession of the farm, and also all the personal property held by him which had belonged to the late William Cost Johnson, with certain specified exceptions. This covenant on the part of the plaintiff has been performed but the defendant has only paid the first instalment of five hundred dollars, of the sum agreed to be paid by him, and has wholly neglected or failed to pay the other two thousand dollars and has neglected or refused to sell the farm to raise the fund with which to discharge his obligation. It is on these facts that the plaintiff has filed his bill in this case, asking an enforcement of the defendant's covenant as a charge or lien on the land, and, in that view, praying that the farm be decreed to be sold to raise the fund to pay off the amount due from the defendant on his covenant. The court below decreed

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in favor of the plaintiff; and the first and most material question on this appeal is, whether the covenant creates a charge or lien, in the sense of a court of equity, that can be enforced in the manner contemplated by the plaintiff's bill?

It is objected that the covenant creates only a personal obligation on the defendant, and that, consequently, there is no jurisdiction in a court of equity to take cognizance of the case. If this were a mere personal covenant, and nothing more, the objection just stated would certainly be well founded.

But that is not our conclusion as to the nature of the covenant. That the covenant does create a personal obligation on the defendant is doubtless true, and one that could be sued on at law; but it does not necessarily follow from that being so, that there may not be also an equitable lien or charge created at the same time. The covenant does not, as may be observed, stipulate in express terms that the land shall be sold and the proceeds of sale applied to the discharge of this particular debt. But we think that is the fair and reasonable implication from the terms employed. In a case like the present, the question whether there has been a charge created depends in a great measure upon the intention of the contracting parties; and here we think it manifest, as well from the language of the covenant itself as from the circumstances leading to it and under which it was made, that the parties contemplated the sale of the farm, and the proceeds of sale as the fund from which the debt was to be paid. In other words, the farm was to be sold, and a sufficient amount of the purchase-money specifically appropriated to the payment of the debt due the plaintiff. If such be the fair construction of the agreement, it created a charge on the land as a security to the plaintiff; for, as was said by Chancellor Sugden, in Rolleston v. Morton, 1 Dr. & W., 195, if a man has power to charge his lands, and agrees to charge them, in equity he has actually charged them; and a court of equity will execute the charge. Here, as we have seen, there are no express words creating the lien or charge upon the land; but there is no doubt of the proposition, that a charge may be created by fair and reasonable implication as well as where express words of trust or charge are employed in the covenant or agreement of the parties. Perry on Trusts, sec. 122, and authorities there cited; and 2 Story's Eq. Jur., sec. 1246.

This case in principle does not differ from that of Legard v. Hodges, 1 Ves., Jr., 477, and same case on rehearing, 4 Bro. C. C. 421. There, a party having obligated himself to pay a certain sum for a particular purpose, as means of raising that sum, covenanted with trustees that he would set apart and pay to such trustees one-third part of the annual profits of his particular estates; and failing to make the application of the profits according to the covenant, and having appropriated them to other purposes, the trustees filed their

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bill to have a trust declared as to the third of the profits of the land; and although it was there contended, as it has been contended here, that there was no lien upon the land, but a mere personal covenant only, it was held, that the covenant created in equity a lien on the land against the covenantor, and those claiming under him with notice. And in deciding the case, the Lord Chancellor said that there was a maxim which he took to be universal, and that was, wherever persons agreed concerning any particular subject, that in a court of equity, as against the party himself, and any claiming under him voluntarily or with notice, raised a trust. To the same effect is the doctrine fully stated by Mr. Justice Story, Eq. Juris., sec. 1231. He there says: "Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate but on personal property or on money in the hands of a third person, wherever that is matter of agreement, at least against the party himself, and third persons, who are volunteers, or have notice. For it is a general principle in equity, that, as against the party himself, and any claiming under him, voluntarily, or with notice, such an agreement raises a trust." See also Power v. Bailey, 1 Ball & Beat. 52. And such being the well established principle upon the subject, the agreement in this case must be taken as having created a charge upon the land, and raised a trust in respect thereto, as security for the payment of the plaintiff's debt; and hence it is the right of the latter, upon failure of the defendant to perform the trust, to have that trust specifically executed by a decree of a court of equity.

The case of Berrington v. Evans, 3 Y. & Coll. 384, relied on by the defendant is not an authority to affect this case. There the covenant was that if the covenantor did not pay certain debts by a given day, he engaged to sell so much of his estates as might be necessary for that purpose. The learned Baron of the Exchequer, who decided the case, said that it did not appear to him that the covenant was anything more than a personal undertaking; but if it were, the case of Williams v. Lucas, 1 P. Wms. 430, n., shewed that the words of it were too general to create a specific lien upon the lands of the covenantor. This latter reason was all sufficient for the case, for it was expressly decided in the case referred to in P. Wms., and also in the case of Freemoult v. Dedire, 1 P. Wms. 429, that a covenant to mortgage or settle lands to secure sums of money, without mentioning or referring to any certain lands, was not sufficient to create any specific lien; and as the covenant in the case of Berrington v. Evans, according to the construction of the learned judge, referred to no particular lands or estates, it created no specific lien, and hence it could be nothing more than a mere personal undertaking. That case, therefore, can have no application to this, even conceding it to have been well decided; a proposition in regard to which we express no opin-

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ion, in view of what was held in the case of Wellesley v. Wellesley, 4 My. & Cr. 561. See Mornington v. Keane, 2 De G. & J. 293.[10]

It is thought that, as the covenant fails to fix any definite time for the payment of the money, or to designate any time within which the farm should be sold, or how to be sold, the defendant was left free to exercise his discretion as to the time and mode of sale, and that a court of equity cannot enforce the sale to be made, as by so doing the defendant would be deprived of a discretionary right of which he was not deprived by the agreement.

But, in reply to this suggestion, it is sufficient to say, that there is no such want of certainty and definiteness in the agreement as to prevent its execution by the court; and as it is alleged and proved that the defendant, although repeatedly requested, has utterly neglected and refused to sell the farm, but retains it for his own profit, and as a reasonable time had elapsed before filing the bill, a court of equity under such circumstances, will not permit him, under the pretense of exercising a discretion as to the time and manner of sale, to evade the performance of his contract. Wellesley v. Wellesley, 4 My. & Cr. 579.

The money agreed to be paid the plaintiff out of the proceeds of sale of the farm became due and payable after the lapse of a reasonable time, within which the farm could have been fairly sold, and the proceeds of sale realized by the defendant on the usual and ordinary terms of sale; Farrel v. Bean, 10 Md. 233; Triebert v. Burgess, 11 Md. 452; and this time having expired, and the defendant failing to show any good reason why he has not performed his contract, the land has become liable to be proceeded against for the enforcement of the charge on it.

Another objection to the decree of the court below is, that, instead of appointing a trustee to make the sale, it should have required the defendant, himself, to make the sale in execution of the contract. This objection we do not regard as well founded. The defendant, by his own neglect or refusal to perform his contract, has occasioned the present application for relief, and as the court proceeds with the matter upon the footing of a trust, it is quite competent to it, in order to make its relief effectual, to appoint an officer of its own to execute its decree. The defendant has been allowed ample time for the sale of the farm or the payment of the money due the plaintiff; and if he does not desire the farm to be sold, he may still avoid that alternative by payment of the money without further delay.

[10] That the agreement must specify the property seems uncontrovertible. Langley v. Vaughn, 10 Heisk. (Tenn.) 553. But in the case of fungible property it may be sufficient specification to name a quantity to be taken from a larger mass. Thus in Dunman v. Coleman, 59 Tex. 199, an agreement charging 1,000 cattle in a herd of a larger number was enforced. So in Payne v. Wilson, 74 N. Y. 348, an agreement to mortgage one of several houses was enforced. Cf. Williston, Sales, § 159.

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The decree appealed from will be affirmed, and the cause remanded that the decree may be executed.

Decree affirmed, and cause remanded.[11]

VANIMAN v. GARDNER

APPELLATE COURT OF ILLINOIS, 1901.
99 Ill. App. 345.

On April 11, 1895, Anthony Robrts and his wife entered into the following written agreement with their son, Moss Roberts:

"Agreement between Anthony Roberts and Sarah J., his wife, of first part, and Moss Roberts, their son, second part. Witnesseth, that said Anthony Roberts is the owner of the N. W. ¼, section 24, township No. 12, range No. 6, west of the 3rd P. M., in Macoupin county, Illinois, on which all of said parties reside and occupy as a homestead; and, whereas, it is desirable that a new house shall be erected on said tract of land for the comfort and use of all said parties so long as they shall live upon said tract of land. It is therefore agreed by the said parties that said Moss Roberts shall erect on said premises a house which shall be convenient and suitable for the use of said parties, including the family of Moss Roberts. That Moss Roberts shall have the right to pull down the old house now on said premises and use the material thereon fit to be used in building the new house, and said new house shall be built and completed within the next ninety days after the date of this agreement.

And in consideration of the said building, the said parties of the first part agree that in case they shall sell the said tract of land, then there shall be due and payable to said Moss Roberts out of the money arising from such sale the sum of $500, together with interest thereon, from the time of the completion of said house until paid, at the rate of six per cent. per annum, and in case of the death of the said Anthony Roberts leaving no will by virtue of which said Moss Roberts shall become devisee and owner of said tract of land, then and in that case, there shall be paid to said Moss Roberts, out of the estate of said Anthony Roberts, the said sum of $500, together with six per cent. interest thereon from the completion of said house until paid.

(Signed) ANTHONY ROBERTS, (Seal)
SARAH J. ROBERTS, (Seal)
MOSS ROBERTS." (Seal)

[11] Brown v. Brown, 103 Ind. 23, and Blackburn v. Tweedie, 60 Mo. 505, are substantially like the principal case except that possession of the land was given to the creditor to be retained until the land was sold and it was held that an equitable mortgage was created.

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The instrument was filed for record and recorded in the recorder's office of Macoupin county, July 12, 1895.

The house was built by Moss Roberts with money obtained from a bank at Virden, Illinois, on notes executed by him and George Vaniman as security. The written agreement was delivered to Vaniman and afterward indorsed as follows:

"I assign the benefit of the within contract to George Vaniman as security to him for signing notes.

(Signed) Moss Roberts."

In 1898 Anthony Roberts and wife conveyed the land to Martha J. Roberts, wife of Moss Roberts, who on August 18, 1900, executed note and mortgage on the land to Alva L. Gardner, to secure an indebtedness of $500, due ten days after date. Gardner filed a bill to foreclose. Appellants, the administrators of George Vaniman, who were made defendants, together with others, answered and filed a cross-bill, in which they set up that there was a lien in favor of the deceased, by virtue of the above quoted agreement, and its assignment, and a payment by them, as administrators of Geo. Vaniman, of the notes on which he was surety for Moss Roberts. The court sustained a demurrer to the cross-bill, holding that appellants had no lien on the land, and rendered a foreclosure decree in favor of Gardner.

Mr. Presiding Justice Harker delivered the opinion of the court.

It is contended by appellant, first that under the written agreement of April 11, 1895, an equitable lien or mortgage was given Moss Roberts upon the land in question, whereby equity will enforce the payment of the $500 specified in the agreement, as a first lien upon the land; second, that appellants are subrogated to all rights of Moss Roberts under the agreement by virtue of his assignment thereof to George Vaniman.

While as a general rule, any written contract entered into for the purpose of pledging property or some interest therein as security for a debt, which is informal or insufficient as a common law or statutory mortgage, but which shows that it was the intention of the parties that it should operate as a charge upon the property, will constitute an equitable mortgage and may be enforced as such in a court of equity, yet a mere promise to pay out of the proceeds of the sale of the property is not sufficient to create an equitable mortgage upon the property itself.

"The intention must be to create a lien upon the property, as distinguished from an agreement to apply the proceeds of a sale of it to the payment of a debt." Jones on Liens, sec. 32; Gibson v. Decius, 82 Ill. 304; Hamilton v. Downer, 46 Ill. App. 541.

We are unable to see in the written contract involved in this case an intention on the part of Anthony Roberts to create a lien or

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charge upon the land. It did not obligate him to sell the land and clearly contemplated that he might or might not sell it as he saw fit. It only provided two events in which there should be due his son the $500; one in case he should sell the land and the other in case he should die leaving no will under which his son should become owner of the land. In the former case the son was to be paid out of the proceeds of sale, and in the latter he should be paid out of the estate of Anthony Roberts. As we view it the import of the contract was more to fix events for the maturity of an obligation than to pledge the land for its payment.

It is evident that there was no intention that Moss Roberts should have a lien on the land for the money in the event of his father dying intestate because the language of the contract is, that in that event, he should be paid out of his father's estate. Again, the provision that in the event of sale by Anthony Roberts, the money should be paid Moss Roberts out of the proceeds of the sale, fully recognizes the right of the former to sell, and that right carried with it the power to invest his purchaser with the title free from any lien arising out of the contract. If the contract created no equitable lien in favor of Moss Roberts, none, of course, can be held to exist in favor of his assignee.

The evidence shows that the $500 note to Gardner represented a bona fide debt, and there is nothing in the record to warrant a suspicion, even, that the giving of the mortgage to him had any other than an honest purpose to secure the debt.

Decree affirmed.[12]

WASHINGTON BREWERY CO. v. CARRY.

COURT OF APPEALS OF MARYLAND, 1892.
24 Atl. 151.

BRYAN, J. Albert Carry filed a bill in equity against Stegmaier and the Washington Brewery Company, a body corporate. It was alleged in the bill that Stegmaier purchased at trustee's sale a certain tract of land in Prince George's county, and that after the sale was ratified he borrowed from the complainant $3,000 to make the cash

[12] Accord: Finn v. Donahoe, 83 Mich. 165; Britt v. Harrell, 105 N. Car. 10; Hossack v. Graham, 20 Wash. 184. See also Clement, Bane & Co. v. Swanson, 110 Iowa 106.

In Knott v. Manufacturing Co., 30 W. Va. 790, an agreement to insure buildings and transfer the policies to a creditor "as additional security" was held to create no lien on the buildings, it being too explicit to be open to implication. The word "additional" was held to mean additional to the security, in the general sense of that term, which was constituted by the personal obligation of the debtor.

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payment, and at the same time promised to secure the repayment of the money by a mortgage on the land, and that he has failed and refused to do so; that afterwards Stegmaier conveyed his interest in the land to the brewery company, and that said conveyance was made for simulated and pretended considerations, and was intended to delay, hinder, and defraud the complainant and other creditors of Stegmaier. The prayer of the bill was that the deed might be declared void; that the agreement to execute the mortgage might be specifically enforced, or, if it could not be enforced, that compensation might be decreed; and that Stegmaier's interest in the land might be sold for the purpose of paying the debt and interest. The answers of the defendant denied the fraud, and pleaded the statute of frauds to the alleged agreement to make a mortgage; not admitting, however, the existence of said agreement. The circuit court passed a decree ordering a sale of the land, and the defendants appealed.

At the time the money was loaned to Stegmaier he executed and delivered to Carry his promissory note for the amount, but the promise to make the mortgage was entirely by parol. The fourth section of the statute forbids any action on a contract or sale of lands, or any interest in or concerning them, unless the contract is in writing. It ought never to have been doubted that a contract to make a mortgage of land was within the terms and meaning of the statute. But, as almost every description of question has been made the subject of controversy, it is not surprising that we find this one adjudicated. Clabaugh v. Byerly, 7 Gill 362; Albert v. Winn, 5 Md. 77; Browne, St. Frauds, § 267. The appellee contends that by reason of the payment of the money the contract has been performed in part, and that he is therefore entitled to a decree for specific performance; and he places great reliance on certain expressions in the opinion of the court in Cole v. Cole, 41 Md. 302. In that case the complainant had loaned one of the defendants a sum of money, with which he purchased a tract of land, and the borrower verbally agreed that he would secure the repayment of the money to the lender by a mortgage on the land, but afterwards refused to do so. The lender filed a bill in equity, praying for a sale of the land to satisfy the debt, or that the borrower might be decreed to execute a mortgage on it to secure the payment of the money loaned, and for general relief. The defendants did not deny the agreement to execute a mortgage, nor did they set up the statute of frauds as a defense. In deciding the case this court used this language: "Cole, having obtained the said advance upon the agreement to execute a mortgage upon the land to secure the repayment, is bound, in equity and good conscience, to performance on his part; and his interest in the property must be held answerable for the same, to the same extent as if the mortgage had been given according to the agree-

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ment. A court of equity will hold him liable, and consider that as done which ought to have been done. There is nothing in the statute of frauds, if it had been pleaded, in conflict with this equitable principle. That statute was enacted to provide as far as possible against the perpetration of frauds, and courts of equity never allow its provisions to be perverted and made instrumental in the accomplishment of fraud. They decree the specific execution of agreements where there has been a performance on one side, because the refusal to perform on the other side is a fraud, and they will not permit the statute designed to prevent fraud to be made an engine of fraud."[13] General expressions like these are frequently found in the reports of decided cases, and in the text-books. Their extreme generality ought to suggest that there must be a great many cases to which they could not be applied. If adopted as rules of decision, they would operate as a judicial repeal of the statute of frauds. The language of courts is usually intended to be interpreted by its application to the case which they are considering, and not as establishing a rule for different cases, which are not at the time under discussion. A very eminent judge has put on record his estimate of these generalities. I allude to the opinion of Lord Chancellor Selborne in Maddison v. Alderson, L. R. 8 App. Cas. 474. Speaking of the equity of part performance of parol contracts, his lordship said: "That equity has been stated by high authority to rest upon the principle of fraud. 'Courts of equity will not permit the statute to be made an instrument of fraud.' By this it can not be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it, and I agree with an observation made by Lord Justice Cotton in Britain v. Rossiter [11 Q. B. Div. 131] that this summary way of stating the principle (however true it may be when properly understood) is not an adequate explanation either of the precise grounds or of the established limits of the equitable doctrine of part performance." In like manner this court has had occasion to express its opinion on the other general rule quoted in Cole v. Cole, that "equity will consider that as done which ought to have been done." In

[13] Accord: King v. Williams, 66 Ark. 333; Dean v. Anderson, 34 N. J. Eq. 496; Sprague v. Cochran, 144 N. Y. 104; and see Baker v. Baker, 2 S. Dak. 261, which also rests on subrogation.

Compare with the foregoing cases, the following from the same jurisdictions, which hold that on a parol contract of sale of land, payment of the consideration is not such part performance as takes the case out of the statute. Keatts v. Rector, 1 Ark. 391; Underhill v. Allen, 18 Ark. 466; Cole v. Potts, 10 N. J. Eq. 67; Nibert v. Baghurst, 47 N. J. Eq. 201; Miller v. Ball, 64 N. Y. 286; Cooley v. Lobdell, 153 N. Y. 596. In Martin v. Nixon, 92 Mo. 26, it was held equity would reform a mortgage by inserting the description of a parcel omitted by mistake and that the omission of the mortgagor's signature could also be corrected; contra, Goodman v. Randall, 44 Conn. 321.

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Clabaugh v. Byerly, 7 Gill 354, the court were considering an alleged parol promise to make a mortgage of land. They say: "By the appellee it is insisted that he is to be preferred because of an agreement which the mortgagor made with him before the date of the deed to the appellants, and upon the principle that equity will consider that as done which ought to be done. No doubt this, when correctly understood, is an established maxim in equity. But there are many things which a man ought to feel himself bound to do, many promises which the party promising ought to feel himself bound to fulfill, and yet which the chancery court can not compel him to perform. The court, then, in order to be justified in regarding an act as done, must have jurisdiction of the case, and to be able to insist that it shall be done." On a little reflection, many exceptions will be perceived to nearly all general rules, however great may be the latitude of the terms in which they are laid down.

It becomes necessary to consider some of the leading cases in which the general expressions used in Cole v. Cole were applied to existing facts, so that we may see the practical limits of the doctrine which they state. In Clinan v. Cooke, 1 Schoales & L. 22, Lord Redesdale considered very fully the doctrine of part performance of parol contracts. Since his time it can not be said that much has been added to his exposition of the subject. On this account, as well as on account of his very great ability and reputation as an equity judge, I will make a considerable extract from his opinion: "But I think this is not a case in which part performance appears. The only circumstance that can be considered as amounting to part performance is the payment of the sum of fifty guineas to Mr. Cooke. Now, it has always been considered that the payment of money is not to be deemed part performance to take a case out of the statute. Seagood v. Meale, Finch, Prec. 560, is the leading case on that subject. There a guinea was paid by way of earnest, and it was agreed clearly that that was of no consequence, in case of an agreement touching lands. Now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both cases as part payment, and no distinction can be drawn. But the great reason, as I think, why part payment does not take such agreement out of the statute, is that the statute has said (§ 13) that in another case, viz., with respect to goods, it shall operate as part performance. And the courts have therefore considered this as excluding agreements for land, because it is inferred that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands. But I take another reason also to prevail on the subject. I take it that nothing is considered as a part per-

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formance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement. This is put strongly in the case of Foxcroft v. Lester [Coll. P. C. 108, 2 Vern. 456]. There the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrongdoer, and to account for the rents and profits, and why? Because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible; and, if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which courts of equity have proceeded in permitting part performance of an agreement to be a ground for avoiding the statute; and I take it, therefore, that nothing is to be considered as part performance which is not of that nature. Payment of money is not part performance; for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for in the case of Foxcroft v. Lester, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent." It might, perhaps, be thought that there was some subtlety in his lordship's reasoning; but nevertheless his opinion is received without dissent, and is regarded as an authoritative declaration of the fundamental doctrine of equity on this subject. In Hughes v. Morris, 2 De Gex, M. & G. 356, Lord Justice Knight Bruce said: "A parol contract for the sale of land, though all the money be paid, without part performance—for the payment of the money is no part performance—can not be carried into effect if the person sued chooses to avail himself of the defect." In Britain v. Rossiter, 11 Q. B. Div. 131, it was said by Lord Justice Cotton: "But it is well established, and can not be denied, that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the fourth section." In Maddison v. Alderson, L. R. 8 App. Cas. 479, the lord chancellor said: "It may be taken as now settled that part payment of purchase money is not enough, and judges of high authority have said the same even of payment in full." And he quoted Clinan v. Cooke, Hughes v. Morris, Britain v. Rossiter. In Purcell v. Miner, 4 Wall. 513, the Supreme Court of the United States said: "But the mere payment of the price in part or in whole will not, of itself, be sufficient for the interference of a court of equity; the party having a sufficient

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remedy at law to recover back the money." In Story, Eq. Jur., § 760, the learned author's conclusions are thus stated: "It seems formerly to have been thought that a deposit or security or payment of the purchase money, or a part of it, or at least of a considerable part of it, was such a part performance as took the case out of the statute. But that doctrine was open to much controversy, and is now finally overthrown. Indeed, the distinction taken in some cases between the payment of a small part and the payment of a considerable part of the purchase money seems quite too refined and subtle; for, independently of the difficulty of saying what shall be deemed a small and what a considerable part of the purchase money, each must, upon principle, stand upon the same reason, namely, that it is a part performance in both cases or not in either." In 4 Kent Comm. (12th ed.) *451, we read: "It was formerly held that payment was part performance, but the more modern doctrine now is that payment of part, or even of the whole, of the purchase money, is not of itself, and without something more, a performance that will take the case out of the statute; for the money may be repaid." In Fry, Spec. Perf., in a note on page 301, it is said: "The rule is now well settled, and all the best authorities agree, that the vendee will not be entitled to the specific performance of a parol contract for the purchase of real property, or an interest therein, merely upon the payment of money, where nothing else is done; and a large number of authorities are cited. In Artz v. Grove, 21 Md. 471, the court, in speaking of certain sums of money paid by the complainant, said that they "were not like part payment of purchase money, which the courts have decided, as between vendor and vendee, do not constitute part performance, because they may be recovered back at law if the contract be vacated or annulled." And the same thing was said in Hopkins v. Roberts, 54 Md. 316. In Green v. Drummond, 31 Md. 71, there was an agreement which was invalid under the fourth section of the statute of frauds, and a sum of money, more than $3,000, had been advanced in pursuance of it, yet it was held that a decree for specific performance of the agreement could not be passed in the case. The decision in Girault v. Adams, 61 Md. 1, has been cited by the appellee's counsel. But in that case specific performance was not decreed. The contract was within the statute of fraud, and, because of the inadequacy of the remedy at law, compensation was decreed, to the extent of the money paid on the alleged contract; and, as the separate estate of a married woman was charged with the payment of the money, it was held that a decree ought to be passed for the sale. It is seen that at one time it was held that payment of purchase money, in whole or in part, was a sufficient part performance; but the contrary doctrine is,

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however, now established by a vast preponderance of authority.[14]

When Stegmaier borrowed the money from Carry, it became his own, and anything which he might purchase with it would likewise become his own property. There could be no lien on the purchased property, arising from the fact that Carry had loaned the money. A lien might exist for money loaned where there was a valid contract for it; but I have shown that the contract in this case is within the prohibitory clauses of the statute of frauds. When a man borrows money, it is generally for the purpose of using it according to his own wishes; and his right to do so is absolute, and not qualified by any claim of the lender on purchases made with it, unless there are restrictions imposed by valid and binding contract. We can not decree compensation on the principles declared in Green v. Drummond, because, as a promissory note was given for the money borrowed, there is a complete and adequate remedy at law for its recovery.

* * * * * * *

I do not find that the brewery company had notice of the agreement to make a mortgage; but it will be seen from what I have said that I regard this circumstance as immaterial. The decree ought to be reversed, and the bill dismissed.[15]

EDITORIAL NOTE.—DEPOSIT OF TITLE DEEDS. In England it is well settled that if an owner of land deposits his title deeds with a creditor as security, this creates an equitable lien on the land. Russel v. Russel, 1 Bro. C. C. 269; Ex parte Kensington, 2 V. & B. 79; Ex parte Haigh, 14 Ves. 402. This doctrine, though much criticised there, is better suited to the English practice in conveyancing, of producing, as evidence of title, the chain of deeds by which an estate is derived, than to our system of recording conveyances.

In this country the doctrine has usually been repudiated as in conflict with the statute of frauds and out of harmony with our

[14] "There is an evident distinction between the cases of loan and purchase; and without expressing any opinion on the question, whether in the former [latter] case, payment of the whole, or of part of the purchase-money, is, or is not, a part performance to take it out of the statute, it is enough to say that the advance of money upon a contract for loan affords, of necessity, no evidence of any intention but that of creating the relation of debtor and creditor." Ld. Elden, in Ex parte Hooper, 1 Meriv. 7.

In the following cases the statute was held to defeat a claim of equitable mortgage, but the doctrine of part performance was not discussed. Goodman v. Randall, 44 Conn. 321; Pierce v. Parrish, 111 Ga. 725; Hackett v. Watts, 138 Mo. 502; Bower v. Oyster, 3 P. & W. (Pa.) 239; Boehl v. Wadgymar, 54 Tex. 589.

[15] The other members of the court reached the same conclusion as Bryan, J., but upon the ground that the record showed the defendant Brewery Company to be a bona fide purchaser, so that, whether complainant was entitled to specific performance as against defendant Stegmaier, it was not as against the former.

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system of conveyancing. Pierce v. Parrish, 111 Ga. 725; Van Meter v. McFadden, 8 B. Mon. (Ky.) 435; Gardner v. McClure, 6 Minn. 250; Gerhard v. Flynn, 25 Miss. 58; Bloom v. Nogle, 4 Ohio St. 45; Meador v. Meador, 3 Heisk. (Tenn.) 562; Bickness v. Bicknell, 31 Vt. 498.

Contra, Hall v. McDuff, 24 Maine 311 (semble); Rockwell v. Hoby, 2 Sandf. Ch. (N. Y.) 9; Chase v. Peck, 21 N. Y. 584 (semble); Hackett v. Reynolds, 4 R. I. 512. See Jarvis v. Dutcher, 16 Wis. 307 (deposit of school land certificates which pass title by assignment).

Of course if the deposit of deeds is accompanied by a written contract the statute is satisfied; and a reference in the contract to the deeds is sufficient description of the land. Hackett v. Watts, 138 Mo. 502; English v. McElroy, 62 Ga. 413, explained in Pierce v. Parrish, 111 Ga. 725; Martin v. Bowen, 51 N. J. Eq. 452. And see, Bank v. Caldwell, 4 Dillon (U. S.) 314.

Even where our courts recognize an equitable mortgage by deposit of title deeds, it does not give the creditor the same practical hold on the land which it does in England, where the owner finds great difficulty in disposing of his land without production of his title deeds.

BURNETT, J., in LEE v. EVANS, 8 Cal. 424 (1857). There are two questions arising upon the record in this case:

1. Whether the grantee in a deed, absolute upon its face, can be permitted to show, by parol proof, that it was only intended as a mortgage, without alleging and proving fraud, accident, or mistake, in the creation of the instrument?

2. If not, whether the answer substantially admits the allegations of the complaint, so as to dispense with proof.

* * * * * * *

The question is one solely relating to evidence. What shall be competent evidence to prove certain facts? The statute says none but written testimony will do, and the courts say oral testimony is sufficient. Is not this a plain contradiction of the statute?

The general rule, that parol shall not be received to contradict written evidence, is founded in true policy, and in good sense. Why should parties state, in solemn instruments, that which is not true? These instruments assume to state the truth, and the whole truth; and if parties will state that which is untrue, should they not justly suffer the consequences? Is not the rule, that parties must be held to mean what they say, the plain, honest, simple, and correct rule at last? It is intelligible, certain, and practical; and if always fairly carried out, will, in the end, be most useful. If not, the legislature should correct it. Where exceptions are intended, they should be specified. And if the legislature intended none, then the courts should not create them.

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Many of the learned judges who have sustained the doctrine that a deed, absolute upon its face, may be shown by parol proof to be only intended as a mortgage, have endeavored to reconcile the rule with the statute.

Thus Mr. Justice McLean says, in the case already referred to: "In cases of trust, equity will sometimes treat a deed, absolute upon its face, as a mortgage, but in doing this, parol proof is not heard in contradiction of the instrument, but in explanation of the transaction, to prevent a perpetration of a fraud by the mortgagee." Now, I confess, I can not understand the force of this explanation. The rule that "treats a deed absolute upon its face, as a mortgage," certainly contradicts the instrument. A written instrument speaks for itself, and if you make it mean contrary to what it says, there must be a contradiction.

Nor can I understand how the parol evidence can be received, "in explanation of the transaction," without contradicting the instrument, for the reason that the instrument and the parol testimony both assume to state the transaction; and as they differ, they must naturally be in contradiction. They both historically relate the same transaction, and the one says it was an absolute sale—the other, it was not such, but a mere mortgage, and is not this a plain contradiction? If A, gives his note to B, for five hundred dollars, and A seeks to prove, by parol evidence, that it was only intended as a note for three hundred dollars, is not this a contradiction? And if the instrument (the very end and purpose of which is to state the contract as it was) says the sale was absolute, and the parol evidence says it was no sale, but only a mortgage, there must be a clear conflict between the two classes of testimony.

And Chief Justice Gibson, in the case already referred to, says: "A formal conveyance may certainly be shown to be a mortgage by extrinsic proof, while a formal mortgage may not be shown to be a conditional sale by the same means. In the one case, the proof raises an equity consistent with the writing, and in the other would contradict it." But here, again, I must confess I can not see the reason of the distinction. To say that a deed absolute is a mere mortgage, is no contradiction—while, to say a mortgage can not be made a conditional sale, without a contradiction, is making a distinction without a difference. If two different witnesses should testify in relation to a transaction concerning personal property, and the one should say it was an absolute sale, and the other that it was only a pledge, I suppose there could be no doubt as to there being a contradiction in the evidence. And if we put in the place of one witness an instrument in writing it can not be said that this circumstance would remove the contradiction in the testimony. The same conflict would still exist.

These attempted explanations only go to prove the difficulties of

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the rule allowing these exceptions, in certain cases, and refusing them in others, when the statute has in terms excluded them in both. The object of the statute was to make written evidence the only testimony to prove certain contracts. And if the courts, contrary to the words of the statute, can change the rule in one case, they can in all, and every written contract might be contradicted by parol proof.

In the case of Stevens v. Cooper, 1 Johns. Ch. R. 429, Chancellor Kent says:

"The plaintiffs in the original suit seek to avail themselves of a parol agreement alleged to have been made between the parties to the mortgage at the time it was executed, by which each lot was to be bound only for a ratable proportion of the mortgage-debt. The mortgage in this, as in ordinary cases, bound every part and parcel of the mortgaged premises for the entire debt, and if such a parol agreement, as is charged, can be proved and set up, it goes to vary, essentially, the operation of the mortgage-deed."

The parol evidence was not admitted, and the learned Chancellor makes these forcible remarks:

"The general rule is certainly not to be questioned or disturbed. It ought not to be a subject of discussion. It is as well grounded in reason and policy as it is in authority. Nor does this case come within any exception, admitted here, to the operation of the rule; for there is no allegation of fraud, mistake, or surprise, in making or executing the mortgage; and those, I believe, are the only cases in which parol evidence is admissible in this court against a contract in writing."

In the case of Webb v. Rice, 1 Hill 608, Mr. Justice Bronson, in his able dissenting opinion, remarks:

"Although I may yield to the opinion of others, I never shall be reconciled to the doctrine that an absolute deed can, at law, be turned into a mortgage by parol evidence, nor that it can be done in a court of equity, except on the ground of fraud or mistake. It is contrary to a first principle in the law of evidence to allow a deed, or other written instrument, to be contradicted by parol proof."

The learned judge quotes a passage from the opinion of Mr. Justice Cowen, in the case of Swart v. Service, 21 Wend. 36, where the latter says:

"For one, I was always at a loss to see on what principle the doctrine could be rested, either at law or in equity, unless fraud or mistake was shown in obtaining an absolute deed, when it should have been a mortgage. In either case the deed might be rectified in equity, and perhaps even at law, in this state, where mortgages stand on the same footing in both courts. Short of that (fraud or mistake), the evidence is a direct contradiction of the deed."

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The general doctrine laid down by this court, in the case of Abell v. Calderwood, 4 Cal. R. 90, would seem to support the view we have taken. The learned judge who delivered the opinion of the court said:

"The agreement being void, by the Statute of Frauds, courts of equity heretofore have, notwithstanding the statute, granted the relief sought in certain cases, where the refusal of it might enable one party to commit a fraud upon the other. In their abhorrence of fraud, these courts have, in a material degree, abrogated the letter and spirit and intention of the written law. In the effort to escape from an evil they have unavoidably fallen into another, and for many years past the best judicial minds of common law countries have conceded that the one they have fallen into is the greater evil of the two."

We think the strict rule the true one, and that in no case can parol evidence be introduced to vary or contradict the deed, except in cases of fraud, accident, or mistake, and then only upon a direct allegation of the defect in the creation of the instrument. In this case the parties understood distinctly what was in the writing. They made it contain just what they intended it should contain.

Evans executed just such an instrument as he intended to execute, and no other. There was no mistake, fraud, or accident, in the creation of the instrument.

If the view we have taken be correct the plaintiff must rely solely upon the admissions in the answer. And this brings us to the second question.[16]

[The learned justice proceeded to examine the pleadings and found an admission by the defendant that the conveyance was a mortgage. Judgment was accordingly rendered for the complainant.]

FIELD, J., in PIERCE v. ROBINSON, 13 Cal. 116 (1859). I place the question whether the conveyance is to be deemed a mortgage, entirely upon the admissibility of parol evidence to establish the fact. The evidence in the record, if admitted, clearly establishes it. The question as to the admissibility of such evidence came before this court in Lee v. Evans (8 Cal. 424) and it was there held that it was inadmissible except in cases of fraud, accident, or mistake, in the creation of the instrument, and the doctrine there asserted was affirmed by Mr. Justice Burnett in Low v. Henry (9 Cal. 538). At the time I took my seat on the bench there were several cases pending before the court in which I had appeared as counsel, and, of course, I was precluded from participating in their decision or expressing any dissent therefrom. Lee v. Evans and

[16] Accord: Brainerd v. Brainerd, 15 Conn. 575 (semble); McClane v. White, 5 Minn. 178 (semble); Frazier v. Frazier, 129 N. Car. 30.

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Low v. Henry were among the number. Both of these cases were decided in favor of the parties I represented, but upon other grounds than those arising from the admissibility of parol evidence.

In Johnson v. Sherman, decided at the July term, 1858, the same question was again presented, and I took the occasion to give, in a separate opinion, the reasons of my dissent from the doctrine announced in Lee v. Evans. A rehearing having been granted, and a change on the bench having since taken place, and Mr. Justice Baldwin concurring with me, I avail myself of this opportunity to reaffirm the views I then expressed, using substantially the language of my dissenting opinion in Johnson v. Sherman, trusting thereby to place the doctrine of this court in harmony with the received doctrine of courts of equity, on this subject, everywhere else.

I consider parol evidence admissible in equity, to show that a deed absolute upon its face was intended as a mortgage, and that the restriction of the evidence to cases of fraud, accident, or mistake, in the creation of the instrument, is unsound in principle and unsupported by authority.

The entire doctrine of equity, in respect to mortgages, has its origin in considerations independent of the terms in which the instruments are drawn. In form, a mortgage in fee is a conveyance of a conditional estate, which, by the strict rules of the common law, became absolute upon breach of its conditions. But, from an early period in the history of English jurisprudence, courts of equity interposed to prevent a forfeiture of the estate and gave to the mortgagor a right to redeem, upon payment within a reasonable time, of the principal sum secured, interest and costs. As the right to thus recover the estate forfeited arose not from the terms of the instrument, but from a consideration of the real character of the transaction, as one of security and not of purchase, it could be enforced only in equity, and was hence termed an equity of redemption. And when the right to redeem had been once established, to prevent its evasion, the rule was laid down and has ever since been inflexibly adhered to, that the right is inseparably connected with the mortgage, and can not be abandoned or waived by any stipulations entered into between the parties at the time, whether inserted in the instrument or not. (Vernon v. Bethell, 2 Eden 113; Butler's Note to Coke on Litt. 2046; 4 Kent 142-144; Story's Equity, § 1019.)

As the equity upon which the courts act arises from the real character of the transaction, it is of no consequence in what manner this character is established, whether by deed or other writing, or by parol. Whether the instrument, it not being apparent on its face, is to be regarded as a mortgage, depends upon the circumstances under which it was made, and the relations subsisting between the parties. Evidence of these circumstances and relations

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is admitted, not for the purpose of contradicting or varying the deed, but to establish an equity superior to its terms. It is against the policy of the law to allow irredeemable mortgages, just as it is against the policy of the law to allow the creation of inalienable estates. Under no circumstances will equity permit this end to be effected, either by express stipulation, or the absolute form of the instrument. The rule which refuses the admission of parol evidence to contradict or vary written instruments is directed to the language employed by the parties. That language can not be qualified, but must be left to speak for itself. The rule does not exclude an inquiry into the objects and purposes of the parties in executing the instruments. It may be shown, for instance, that a deed was made to defraud creditors, or a release given to render a witness competent. The purposes and objects of the parties are considered by a Court of Chancery, and constitute a large ground of its jurisdiction, which will be exercised to restrain or to effectuate them, as may best promote justice. Thus, a deed executed for a fraudulent purpose will be set aside; and as it is the settled policy of equity, admitting of no departure, never to permit a security to be converted by any contemporaneous agreement into a sale, the purposes of the parties in giving and taking an absolute conveyance will be inquired into; and when the rights of third persons have not intervened, a Court of Chancery will control the use of the instrument intended as security in the hands of the grantee, so as to effectuate its object. Unless parol evidence can be admitted, the policy of the law will be constantly evaded. Debtors, under the force of pressing necessities, will submit to almost any exactions for loans of a trifling amount, compared with the value of the property, and the equity of redemption will elude the grasp of the court and rest in the simple good faith of the creditor. A mortgage, as I have observed, is, in form, a conveyance of a conditional estate, and the assertion of a right to redeem from a forfeiture involves the same departure from the terms of the instrument, as in the case of an absolute conveyance executed as security. The conveyance upon condition, by its terms, purports to vest the entire estate upon the breach of the condition, just as the absolute conveyance does in the first instance. The equity arises and is asserted, in both cases, upon exactly the same principles, and is enforced without reference to the agreement of the parties, but from the nature of the transaction to which the right attaches, from the policy of the law, as an inseparable incident.

In Lee v. Evans, the majority of the court appear to have overlooked, in their anxiety to preserve the integrity of conveyances from attacks of parol, the distinction between evidence of facts raising an equity which will control the operation of the instrument in the hands of the grantee, and evidence to contradict or

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vary the legal effect of its terms, and yet that distinction is the foundation of the entire equitable doctrine of mortgages.

Fraud, accident, and mistake are special grounds of equity jurisdiction, and may be shown by any satisfactory evidence, written or verbal, with reference not merely to mortgages, but to all written instruments. From their nature they must generally be established by parol evidence. And the evidence is admissible, not for the purpose of contradicting or varying the terms of the instrument—not to make its language mean one thing, when it speaks another, but to show a state of facts *dehors* the instrument, raising an equity, which a Court of Chancery will enforce by annulling or reforming the instrument, or limiting its operation, or enjoining its use. And the doctrine is both novel and startling which restricts, in matters of fraud, its jurisdiction over the operation of written instruments to those cases where the fraud has been committed in their creation. If maintained, it will sweep away its heretofore admitted jurisdiction in an infinite variety of cases, of almost daily occurrence, where the fraud alleged consists in the use of instruments entered into upon mutual confidence between the parties. Fraud in their use is as much a ground for the interposition of equity, as fraud in their creation. There is no distinction in the principle upon which the jurisdiction is asserted in the two cases. In both there is the same abuse of confidence, and from both the same injury results.

In Hultz v. Wright, the Supreme Court of Pennsylvania said: "As to fraud, it is not supposed to be necessary to have proof express that a writing has been obtained fraudulently, in order to admit parol evidence against it on that score; but parol evidence may be admitted to resist the fraudulent use of a writing in the obtaining of which no fraud can be made to appear." (16 Seargt. & Rawle 346.) And in Oliver v. Oliver (4 Rawle 144) the same court said: "When the fairness of the transaction is impeached, it is immaterial whether the party intended a fraud at the time of the contract, or whether the fraud consists in the fraudulent use of the instrument. * * * It is no answer to say that the parol evidence is in opposition to the deed; for where there is fraud, or the party attempts to make a fraudulent use of an instrument contrary to his contract, parol evidence is admitted to prevent injustice."

"A deed," says Kent, "absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage as between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by agreement resting in parol, for parol evidence is admissible in equity to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted, or de-

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stroyed by fraud, surprise, or mistake." (4 Com. 143.) And Mr. Justice Story, after quoting this passage, adds: "It is the same if it be omitted by design, upon mutual confidence between the parties, for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice. I do not comment upon this subject at large because it seems to me wholly unnecessary, in the present state of the law, to do more than enunciate the principles which govern cases of this nature, and which are as well established as any which govern any branch of our jurisprudence." (Taylor v. Luther, 2 Sumner 233.)[17]

CULLEN v. CAREY.

SUPREME COURT OF MASSACHUSETTS, 1888.
146 Mass. 50.

Bill in equity to compel the reconveyance of land on the ground that the transaction by which the defendant's testator gained title was in substance a mortgage. Writ dated December 24, 1885.

[17] Accord: Blakemore v. Byrnside, 7 Ark. 505 (semble); Ruckman v. Alwood, 71 Ill. 155 (semble); Brown v. Follette, 155 Ind. 316; McDonald v. Kellogg, 30 Kans. 170; Oberdorfer v. White, 25 Ky. L. 1629; Stinchfield v. Milliken, 71 Maine 567; Campbell v. Dearborn, 109 Mass. 130; McMillan v. Bissell, 63 Mich. 66; O'Neill v. Capelle, 62 Mo. 202; Strong v. Stewart, 4 Johns Ch. (N. Y.) 167; Wallace v. Smith, 155 Pa. St. 78; Loving v. Milliken, 59 Tex. 423; Wright v. Bates, 13 Vt. 341; Russell v. Southard, 12 How. (U. S.) 139.

In Campbell v. Dearborn, supra, the court, while sustaining the broad rule of the principal case, say, by Welles, J., "We can not concur in the doctrine advanced in some of the cases, that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud and breach of trust, which affords ground of jurisdiction and judicial interference. There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back, and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit. In this aspect only can we regard it in the present case."

By the great weight of authority, when land is conveyed by absolute deed upon an oral trust for the grantor equity will not enforce the oral trust, nor will it create a resulting or constructive trust to prevent the wrong thereby inflicted upon the grantor.

The argument that there is fraud in the use of the deed, or a breach of confidence, which justifies relief, is usually rejected as an evasion of the statute, "because the fraud consists only in the refusal to execute the trust. The court, therefore, can not say that there is a fraud, without first saying that there is a trust. And the parol evidence, if admitted, must be admitted to establish the trust, in order that the court may

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In the superior court the case was referred to a master, who found the following facts:

In 1869 the plaintiff bought the land in question, subject to a mortgage, and proceeded to erect a tenement house. Leonard Carey, the husband of the defendant, who was a carpenter and indebted to the plaintiff for money lent, built the house for the plaintiff, supplying nearly all the materials and labor under an oral agreement whereby his indebtedness to the plaintiff was to be applied in payment of the cost of construction. When the house was completed the balance due Carey, after paying his debt to the plaintiff, was $1,106, and the value of the house and land above the existing mortgage was $3,300. The plaintiff moved into the house and occupied it about six months.

On or about June 1, 1870, the plaintiff and Carey made an oral agreement that Carey should gain title to the premises by levy on execution, and by a sale under the power in the mortgage, and hold them as security for the plaintiff's debt to him, and, after payment of the debt and expenses out of the rents, should reconvey to the plaintiff. In pursuance of this agreement, the plaintiff, on June 1, 1870, gave to Carey a note for $4,000, upon which an action was brought and judgment obtained by default against the plaintiff as agreed. An execution was issued and levied by a sale to Carey of the plaintiff's equity of redemption in the premises for $4,317.39, and a conveyance in due form was made to him on May 29, 1871. On July 6, 1871, Carey, by the payment of $583.17, procured the assignment of the mortgage to a third person, who proceeded in due form to sell the premises under the power therein to Carey for $950, and a deed was given to him and duly recorded.

Prior to the sale on execution and under the mortgage, Carey was put in possession of the premises by the plaintiff, and so continued until his death, on October 25, 1885. At various times the plaintiff demanded of Carey a settlement and reconveyance of the premises, his last demand being made a few days before Carey's death, in the presence and hearing of the defendant. Carey made a will, by which his real estate was devised to the defendant, who took possession of the premises and continued to receive the rents and profits. The defendant declined to file an account, but it was agreed by both parties that the receipts by Carey and the defendant had been sufficient to pay the plaintiff's debt to Carey, including interest and expenses. The master also found that there had been no laches on the part of the plaintiff.

The case was then heard on the report of the master, and a

charge the party with fraud in setting up his claim against it." Paine, J., in Rasdall v. Rasdall, 9 Wis. 379. See Article by J. B. Ames, in 20 Harv. L. Rev. 549.

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decree was entered that the defendant convey the premises to the plaintiff. The defendant appealed to this court.

MORTON, C. J. It was held in Campbell v. Dearborn, 109 Mass. 130, that, although a deed be given which is absolute in form, yet the grantor may prove by parol testimony that it was understood and agreed by both parties to be given as security for a debt; and that upon such proof a court of equity will treat the deed as a mortgage. This is decisive of the case at bar.

For some reason, which does not appear to be fraudulent, the plaintiff did not directly convey the estate in question to the defendant's testator; he permitted the latter to obtain a judgment upon a debt in part fictitious, and thus to get a title by a levy upon the execution, and also to foreclose by a sale under an existing mortgage. But the substance of the transaction was the same as if a deed had been directly given by the plaintiff. Both parties agreed that the title thus obtained was to be held solely as security for the debt of the plaintiff to the defendant's testator, and a court of equity will treat the transaction according to its real nature as a mortgage.

The defendant does not stand in the position of an innocent purchaser, as she contends. She took as a general devisee under the will of her husband, and besides is shown to have had notice of the nature of the transaction.

Decree affirmed.[18]

EDITORIAL NOTE. When land is conveyed by absolute deed, either upon a present consideration or upon a pre-existing indebtedness, and the grantee agrees that, upon payment to him of a certain sum at a certain time, he will reconvey the premises to the grantor, it

[18] "It is frequently the case that parties desire to give security upon lands the title to which is not in them, but is subject to their control. It is also frequently true that they desire to give it upon lands owned by them, but liable to be sold on judicial proceedings against them. The rule itself being once established, that parol evidence may be admitted to show an absolute deed a mortgage, when such an agreement is clearly established, we do not think it material whether a judicial sale was adopted merely as a means of conveying the title to the mortgagee, or whether it was conveyed to him by some third party for and on account of the mortgagor. These circumstances furnish no substantial grounds for distinguishing the case from a direct conveyance from the mortgagor, and the cases which have established the rule do not make any distinction." Paine, J., in Sweet v. Mitchell, 15 Wis. 641, 664.

See also, Smith v. Cremer, 71 Ill. 185; Beatty v. Brummett, 94 Ind. 76; Fisk v. Stewart, 24 Minn. 97; Niggeler v. Maurin, 34 Minn. 118; Stoddard v. Whiting, 46 N. Y. 627.

Cases of this sort are sometimes disposed of under the theory of resulting trust. McDonough v. O'Niel, 113 Mass. 92; Hidden v. Jordan, 21 Cal. 92. Pomeroy Equity, § 1038.

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is often a very difficult problem to determine whether this transaction amounts in law to a mortgage, or simply to what is called a "conditional sale," meaning thereby a conveyance with contract for repurchase. The latter is, of course, what the transaction, upon its face, appears to be; but, under the equitable doctrine of mortgages, if the parties have used this form of transaction to secure a debt to the grantee, equity will treat it as a mortgage, and parol evidence is admissible to determine what the real purpose of the transaction was.

The question, then, becomes one of intention—whether the intention of the parties was to effect a sale or a security; and this, in turn, depends chiefly upon the question whether there was a debt to secure. Authorities on this subject are therefore placed in section 2 of this chapter, entitled The Debt, *q. v.*

SECTION 2.—THE SUBJECT MATTER.

TIFFANY, REAL PROPERTY, § 509. Any interest in land which may be the subject of sale, grant, or assignment may be mortgaged. Accordingly, there may be a mortgage of a rent, an estate in expectancy, an estate tail, an estate for life, including a widow's dower estate, and an estate for years. A mortgagee's interest may itself be mortgaged, whatever theory be held as to the character of such interest. An heir or devisee may mortgage his interest in the estate of the deceased, subject to the payment of the latter's debts.

A mortgage may be made of improvements on land apart from the land itself, and growing crops may be mortgaged by the owner of the land.

Equitable interests, as well as legal, may be mortgaged; a usual instance of such a mortgage occurring in the case of a mortgage by the vendee under a contract of sale. The mortgage of an equitable interest in land cannot, it would seem, in states in which the legal theory of mortgages is recognized, have the effect of passing the legal title to the mortgagee, since the mortgagor has no such title to pass.[19] And

[19] Nor can it, in states in which the lien theory of mortgages is recognized, have the effect of creating a legal lien, since no legal interest can be raised out of an equitable interest. In short it is an equitable mortgage, though it be perfectly regular in form. Brockway v. Wells, 1 Paige (N. Y.) 617. If the mortgagee afterward gets in the legal title from the trustee or vendor, either with the consent of the mortgagor,

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so in England it is recognized that a second mortgage—that is, a mortgage of the mortgagor's interest—passes no legal title to the mortgagee. In this country, however, no such distinction between the positions of first and second mortgagees seems to be recognized.[20]

SEYMOUR v. THE CANANDAIGUA RAILROAD CO.,

SUPREME COURT OF NEW YORK, 1857.
25 Barb. (N. Y.) 284.

This action was commenced for the foreclosure of a mortgage, given by the Canandaigua and Niagara Falls Railroad Company upon its railroad, track and franchises, and appurtenances, to secure the payment of $1,000,000 of the bonds of said company, issued to, and held by different persons. The mortgage was executed in due form, and bore date March 17, 1852.

Niggeler v. Maurin, 34 Minn. 118, or without his consent, Meigs v. McFarlan, 72 Mich. 194, we then have an equitable mortgage of the sort presented in the preceding chapter, the legal title being acquired by absolute deed but for the purpose of security. Cf. Cullen v. Carey, supra.

[20] The English doctrine regarding junior mortgages is the logical result of the English theory that the first mortgage passes the whole legal estate leaving only an equity in the mortgagor. In this country the status of junior mortgages has not been frequently passed upon, due to the fact that our recording system has largely eliminated the practical significance of the distinction between legal and equitable mortgages. The logic of our lien theory leads irresistibly to the conclusion that senior and junior mortgages are technically alike, except for priority, for the legal title, remaining always in the mortgagor, is capable of raising an indefinite number of legal liens. This seems never to have been questioned. Under the title theory, while the logic of the case is not so simple, the same result would flow from the accepted, though paradoxical position, that, while the mortgage passes a legal title to the mortgagee, for the purpose of security, the general ownership, at law as well as in equity, remains in the mortgagor. If the general legal ownership remains in the mortgagor, it is capable of raising more "legal titles for the purpose of security." That a second mortgagee has a legal title was held in Gooding v. Shea, post; and see Sanders v. Reed, ante. But see Jackson v. Turrell, 39 N. J. L. 329, "A second mortgagee is, at law as well as in equity, a mere lien holder. * * * The reasons which support the claim of the first mortgagee defeat the claim of every other one, to be regarded as the legal owner of the fee." And see Goodman v. White, ante, accepting the English doctrine without qualification.

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The defendants were duly organized as a corporation, under the general railroad act of this state, passed April 2, 1850, for the purpose of constructing a railroad between the village of Canandaigua in the county of Ontario, and the suspension bridge over the Niagara river, near the village of Niagara Falls. It did not appear at what precise date the company were organized; but from the proceedings of the company, produced in evidence, it must have been in or before the year 1851. And from like proceedings it appeared that the route of the said road was surveyed in or before the termination of the said year 1851. From proceedings of the board of directors of March 18, 1852, in evidence, it appeared that they claimed or asserted that the route of the said road, from the Genesee river west to the Tonawanda creek, had been located before that time; that on the 16th of April, 1852, the directors altered the route; and that the route from Tonawanda to Niagara Falls was also altered July 16, 1852.

It was in proof that a certificate of location in Erie county, according to the statute, with a map or profile annexed, was filed in Erie county clerk's office on the 4th day of April, 1852. This location of the road crossed the Tonawanda creek at a considerable distance east of Tonawanda village, and laid down no branch track to the river.

On the 22d of December, 1852, the company changed, in due form, the location of their road for a considerable distance in Erie and Niagara counties, and laid down a branch or side track in the village of Tonawanda, from such altered line to the Niagara river, a distance of 7,132 feet; and filed a map and certificate of such change in the clerk's office of Erie county, December 30, 1852, and in the Niagara county clerk's office December 31, 1852.

It did not appear when the work of constructing the railroad was actually commenced; or when the company commenced acquiring the title to lands needed for it, or what lands, if any, were actually acquired before the date or giving of the mortgage in question. It appeared that the road was open for travel from Canandaigua to Batavia, in January, 1853, and thence west to the suspension bridge, in July 1853; thus completing the line of railway from New York to the suspension bridge via the New York & Erie railroad.

The mortgage was recorded in the counties of Ontario, May 3, 1852, Monroe, May 4, Erie and Niagara, May 5, Livingston, May 6, and Genesee, June 10; the railroad being situated in parts of said counties. The mortgage, after reciting that the said railroad company, in pursuance of the power conferred upon them by the act of the legislature of the state of New York, entitled "An act to authorize the formation of railroad corporations, and to regu-

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late the same," passed April 2, 1850, were then engaged in constructing a railroad from Canandaigua to the suspension bridge in the village of Niagara Falls; and that the said company, for the purpose of completing and operating the said railroad, had deemed it necessary to borrow money, and had resolved to borrow $1,000,000, to be applied to the construction and completion of the said railroad, and to issue bonds in the sum of $1,000 each, to be secured by a mortgage, did for that purpose "grant, convey, transfer and set over" to the plaintiff and one George S. Coe, in trust for said bond holders, "the said railroad constructed and to be constructed, together with all and *singular* the railways, rails, bridges, fences, privileges, rights and real estate now owned by said company, or which shall hereafter be owned by them, and all the tolls, incomes, issues and profits (whenever the said party of the first part shall be in default of making payment) to be had from the same, and all the franchises of the said company, and all lands used and occupied, or which may hereafter be used and occupied for railways, depots or stations, with all buildings erected or which may hereafter be erected thereon." The company covenanted, in said mortgage, to use the money borrowed in the construction of the railroad, and to make, execute and deliver all and *singular* and further assurances and instruments as should from time to time be necessary and as the counsel of the trustees should advise or require—so as to embrace said railroad when complete, and all its property intended to be conveyed or acquired, and to be thereafter acquired.

On the 16th of April, 1853, the company executed a second like mortgage, to secure another loan of $750,000, which contained the following clause: "Subject to a previous mortgage, of sterling bonds equivalent to $1,000,000." Also, on the 20th of December, 1853, a third mortgage was executed by the company to secure another loan of $600,000, subject to the two mortgages above mentioned, in the same manner.

The defendant Hines, on the 10th of June, 1854, recovered a judgment against the railroad company for $12,227, of which a transcript was duly filed in the counties of Erie and Genesee July 11, and Niagara July 12, and were duly docketed. The defendants Otis and Worthington, on the 30th day of June, 1854, recovered a judgment against the railroad company for $698.34, of which transcripts were duly filed and judgment docketed July 5 and 6 thereafter, in Niagara, Genesee, Ontario, Monroe and Livingston counties, and on the 23d in Erie county.

The premises whereon the branch track was built, at Tonawanda, as soon as located from the present main track to Niagara river, and the lands occupied by the dock and warehouses of the com-

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pany on the river, were conveyed to the company subsequent to the recording of the plaintiff's mortgage, and on or about the first day of March, 1853. The judgment of the defendant Hinds was recovered for work done and materials furnished in constructing such docks. The title to the lands occupied by the branch track and dock was purchased by the company as above stated, and paid for in the stock of the company. An association was formed at Tonawanda, in 1852, of which Hinds was a member, to secure and divert a portion of the business from Lake Erie to Tonawanda; and the railroad company, in December, altered the line of their track, as above stated, in aid of that enterprise.

It was proved, also, that many pieces of land, taken and used for the said railroad, were purchased and the title thereto actually received, in Genesee county, after the plaintiff's mortgage was recorded in that county. And that five pieces or parcels of land purchased at Batavia, in that county, were never used or occupied for railroad purposes.

The defendants Hinds, Otis and Worthington, claimed that their respective judgments were liens upon all the lands of the railroad company acquired after the plaintiff's mortgage was recorded, and particularly upon the lands taken for the branch or side track at Tonawanda, and upon the lands not taken, acquired or used for railroad purposes at Batavia and other places, contiguous to said railroad, within said counties, through which the same passes. To show that the branch road or track aforesaid was contemplated by the company before the giving of the first mortgage, the plaintiff's counsel presented a report, made by the president of the said company, printed in 1851, but otherwise without date. This report contained a general description of the corporation and its franchises; the project for the road; the supposed cost; the length of road; the cost of depots and machinery; its relation to other railroads; and its prospects of business and income, were given. In this report it was stated that the road would be "the shortest route between New York City and Tonawanda, the best harbor on Lake Erie." In another part of the report was the following statement: "The harbor of Tonawanda is probably the best on Lake Erie, and is far safer and more capacious than that of Buffalo. A thriving town has grown up at this point, which bids fair, at no distant day, to become a place of great importance, if not, indeed, the center of the lake trade. The imports of Tonawanda, in the year 1851, amounted in value to nearly $100,000, and its progress of late has been more rapid than that of any town on the lake. At this point the Canandaigua and Niagara Falls road will receive the traffic of the lake, while at Niagara it will receive that of the land route."

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SMITH, J. * * * At the time when the mortgage was thus put upon record, it doubtless took effect as a valid mortgage, at law, in behalf of all persons who then had made advances, or should thereafter make advances upon these bonds or any of them. As a legal instrument of conveyance it was then notice to all the world, and was valid and operative to bind all the property and franchises then owned by the corporation embraced within its terms and description. So far as relates to property then acquired, this is not disputed and is indisputable.

The chief question in controversy relates to the property of the railroad company not then owned or acquired by it. When the mortgage was first put on record, May 3d, 1852, it does not appear how far, or to what extent, the railroad company had acquired the right of way for the railroad. They obviously commenced the work of constructing the road at Canandaigua, its eastern terminus, and worked westward, for it appears it was completed and put in operation from Canandaigua to Batavia by the 1st of January, 1853, and from that point to the suspension bridge, at Niagara, on the 1st of July following, and there is no proof that the right of way was not all acquired up to the east line of Genesee county, at the time of recording the mortgage. In Genesee, Erie and Niagara counties, confessedly, much of the right of way was acquired after the mortgage was recorded in those counties respectively. Upon all such lands clearly the plaintiffs' mortgage was not and is not a valid lien at law. It is a fundamental maxim of the common law that a man can not grant or convey what he does not own. (Perkins, tit. Grant No. 65 Noy's Maxims 62. Bacon's Maxims reg. 14.) In giving the mortgage, the railroad company did not profess to own or to mortgage the whole right of way for the railroad. They granted "all and singular the railways, rails, bridges, fences, privileges, rights and real estate now owned by the said company, or which shall hereafter be owned by them, and all lands used and occupied, or which may hereafter be used and occupied for railways, depots or stations, with all buildings erected, or which may be hereafter erected thereon." Here was a distinct notice that there were lands yet to be acquired, and buildings yet to be erected. The mortgage contains a covenant that the money loaned shall be used in constructing the railroad. The railroad company, therefore, did not profess to mortgage the road as complete, or with a title to the lands required for its use as acquired. There is therefore no question of estoppel in the case, as law, as against the railroad company itself.[21] But the plaintiffs claim that their mort-

[21] "Recitals, it is true, and covenants, may conclude parties and privies, and estop them from denying that the operation of the deed is what it

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gage is a valid lien, in equity, upon the subsequently acquired property. It is not denied by the learned counsel for the defendants that such a lien may exist which courts of equity may sustain and enforce in many cases where there is no relief at law, but it is insisted that this is not a case of equitable mortgage, and that the rights of the defendants as judgment creditors are superior to any equities of the plaintiffs in respect to these subsequently acquired lands.

Courts of equity, though unembarrassed by the strict and technical rules of the common law, do not administer justice except in conformity with settled principles. It is the province and duty of, such courts to relieve against defects and imperfections at law in the making of contracts. Regarding all just and honest contracts as binding in conscience and equity, they seek to give to them full effect and operation, according to the real intention of the contracting parties. Upon this principle they enforce the specific execution of contracts and give relief in numerous cases of agreements relating to lands, and things in action, and contingent interests or expectancies, upon the maxim that equity considers that done which, being distinctly agreed to be done, ought to have been done. (Grounds and Rudiments of Law and Equity 75.) Upon this principle, when it is expressly agreed to give a lien upon lands, courts of equity have long held that such agreement was to be treated and considered as giving a specific lien upon the land. The learned counsel for the defendants concede this to be so, and contend that the rule was rightly stated in Fonblanque, b. 1, ch. 5, § 8, and in the cases reported in 1 Peere Williams, pp. 282, 429. Fonblanque states the rule thus: "A covenant to settle or convey particular lands will not, at law, create a lien upon the lands, but in equity such a covenant, if for a valuable consideration, will be deemed a specific lien on the lands, and decreed against all persons claiming under the covenanter except purchasers for a valuable consideration, and without notice of such covenant," and refers to

professes to be. And when a deed purports to pass a present interest, recitals and covenants have, in many cases, been held efficacious to pass to the grantee an interest subsequently acquired by the grantor. But when the deed does not undertake to convey any existing estate, when the subject of the grant is only an expectancy, it is difficult to conceive of it as anything more than a covenant for a future conveyance. In the very nature of things it must be executory. The case in hand is an apt illustration. The intention of the parties was not to convey any immediate interest, for it was known Mrs. Jay had none. The grant and the covenants alike contemplated an assurance to the mortgagee of an estate which might possibly thereafter be acquired either by descent or will, an assurance necessarily future." Strong, J., in Baylor v. Commonwealth, 40 Pa. St. 37. See on Estoppel, Tefft v. Munson, post.

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Coventry v. Coventry, reported at the end of Francis' Maxims. Fonblanque also says (b. 1, ch. 4, § 2): "So, although a grant of a possibility is not good at law, yet a possibility, or a trust in equity may be assigned. So a covenant to settle lands, of which he has only a possibility of descent, shall be carried into execution in equity, for the court does not bind the interest, but instead of damages, enforces the performance in specie." Chancellor Walworth, in the Matter of Howe (1 Paige 129), and in White v. Carpenter (2 *id.* 266) affirms this principle, and in Howe's case he refers to most of the English cases holding this doctrine, with approval, and cites quite a number of American cases, from other states, to the same effect.

The counsel for the defendant Hinds, however, among other cases cited and commended to my particular attention on this point, the case of Otis v. Sill (8 Barb. 102). This was a case at law. The only question raised and decided was whether at law a chattel mortgage bound property not *in esse* at the time of its execution. The mortgagor professed to sell and assign to the plaintiff not only all the scythes, iron, steel and coal then owned and possessed by him, but also all scythes, iron and coal which might be purchased in lieu of the aforesaid property. The court, in that case, held that a chattel mortgage could not operate at law on property not in actual existence at the time of its execution.[22] The decision

[22] "To the proposition that a prior general mortgage, which in terms covered after acquired property, attached to rolling stock as soon as acquired, to the displacement of a contractual lien on it, the Supreme Court of the United States, by Justice Bradley, said, 'The doctrine is intended to subserve the purposes of justice and not injustice. A mortgage intended to cover after acquired property can only attach itself to such property, in the condition in which it comes to the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time.' U. S. v. New Orleans Railroad Co., 12 Wall. (U. S.) 362. And it was added, that such a prior lien or equity does not come within the reason of the registry laws, which are intended for the protection of subsequent, not prior, purchasers and creditors.

"This court, touching the same matter, in Shorter v. Frazer, 64 Ala. 74, quotes approvingly the language of C. J. Marshall in Vattier v. Hind, 7 Pet. (U. S.) 272, that, 'The rules respecting a purchaser without notice, are framed for the protection of him who purchases a legal estate, and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. Even the purchaser of an equity is bound to take notice of any prior equity.' And in the same case, the court hold, that if the purchase is of a mere equity, which can be enforced only through the instrumentality of a court of equity, there is no reason for a departure from the general principle, that priority in point of time creates priority in point of right, and that the transfer or conveyance must be limited to the interest of the grantor." Haralson, J., in Wood v. Holly Mfg. Co., 100 Ala. 326, 351.

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was clearly right. (1 Man. Gran. & Scott 379.) The learned judge who gave the opinion of the court, it is true, in the course of his opinion, discussed at some length the question whether the mortgage was valid in equity, but concluded that the pleadings did not raise that question so that relief could be given in equity, and the case was decided as purely one of law; and although the learned judge doubted whether the rule in equity in respect to mortgages or contracts for a lien upon subsequently acquired property applied to that case, and considered that Judge Story had carried the doctrine too far in the case of Mitchell v. Winslow (2 Story 630), yet he assents to the rule so stated above in Fonblanque, and by the Chancellor. He says, page 129, "The agreement to execute a mortgage on particular lands described in the agreement is doubtless, in equity, a specific lien on the land, and will be preferred to subsequent judgment creditors."

The rule as here stated, that the mortgage or agreement must refer to particular lands, is doubtless the true one. It was so laid down in the leading case of Fremoult v. Dedire (1 Peere Williams 430). In this case, Dedire had covenanted to settle his lands in Rumney Marsh, and also other lands that should be of the value of £60, upon his wife for her life. The lord chancellor held, that with regard to the lands in Rumney Marsh, the marriage articles created a specific lien upon them, but the covenant for settling lands of the value of $60 per annum, did not specifically bind any lands. The same obvious distinction runs through all the cases. When the agreement would be void, for uncertainty, in not describing, or designating plainly, any lands or property, no lien can attach. A lien must have a specific reference. It must necessarily apply to some designated property, either *in esse* or expectancy, and this clearly and unmistakably. Unless the agreement, or mortgage plainly describes or designates particular lands, it must be regarded as a mere executory contract, and enforceable only as such. (Winslow v. Merchants' Insurance Co., 4 Met. 306.) And it must clearly appear too, that it was the intention of the parties, in any covenant or agreement, to give a lien upon the property. (Rogers v. Hosack's Executors, 18 Wend. 319.) In this last case, referred to by Judge Paige in Otis v. Sill, the covenant was to pay the balance of a debt from a certain fund. This was held to create no lien upon the fund, and to be a mere executory agreement. Judge Cowen (p. 334) says: "Here is no assignment, no mortgage, or pledge, no order, or any other specific appropriation of the French funds, but a mere covenant to pay them over on their being obtained by the covenantee." Senator Dickinson, also speaking of another fund, says: "The English claim is disposed of by words of assignment and transfer. Can it be possible then, that with an in-

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tention to create a specific lien or equitable mortgage upon the French fund, the parties should have left this large fund to the caprice of implications?" In both these opinions the rule is clearly recognized that an agreement for a lien is a lien in equity, when it is clear that it was the intention to give or create such lien. In the case of Otis v. Sill, however, the learned judge says of these cases of assignments or mortgages of property, to be acquired *in futuro,* "If such an assignment of property, to be acquired, is valid in equity, it is only valid as a contract to assign, when the property shall be acquired, not as an assignment of a present interest in the property; and if it is enforced in equity, it can only be enforced as a right under the contract, and not as a trust attached to the property." If the learned judge means by this, that a sale, assignment or mortgage of property not *in esse,* or of contingent interests, or expectancies, confers no title or interest in the thing, *in presenti,* that is self-evident. But if it is meant that the sale or assignment of such property, to be acquired *in futuro,* or of contingent interests, or expectancies, rests in contract merely till some new assurance, and does not attach, as a lien, or charge, as soon as the property is acquired, or has a substantial existence, I can not agree with him. As soon as the property is acquired, or comes into existence, the lien in or upon it attaches. They come into being together and coexist. Equity executes the contract by holding that what is agreed to be done is done. That the right to the lien creates the lien. (Wright v. Wright, 1 Vesey 409, 410.)

Judge Story, in Mitchell v. Winslow (2 Story 644), states the rule with great clearness, as follows: It seems to me a clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then in being or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice or in bankruptcy." The same doctrine is also asserted, in substance, by Vice Chancellor Wigram, in Langton v. Horton (1 Hare 549), in an opinion of great clearness and ability; and in 1 Jac. & W. 526; 4 Simons 624. An assignment of that which is expected to be the fruit of an undertaking already commenced, of possibilities coupled with an interest, or of a thing which, in the ordinary course of events, will exist at a future time, is valid in equity (1 Myl. & K. 488, 6 Simons 414, 224; 8 Price 269), but not a mere naked possibility, and not an interest incapable of being made the subject of a contract. (4 Kent 144.) These cases, and this view of the rule in equity, in

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respect to the assignments of future interests or possibilities, is clearly sustained and affirmed in the opinion of Judge Wells, in Field v. The Mayor of New York (2 Selden 186).[23]

Considering, therefore, the rule in equity to be that a grant of particular lands, to be acquired *in futuro,* is valid, and takes effect as a specific lien upon the lands as soon as they are acquired, it remains to apply the principle to the facts of this case. Upon the evidence, I think that I am to assume that the line of this railway, from Canandaigua to Suspension Bridge, was located before the mortgage was put on record in any county. It is true that it was afterwards altered in Erie and Niagara counties, but that, I think, does not affect the question I am now considering. The railroad company, by the 28th section of the general railroad act, which must be deemed a part of its charter, and to be part of the contract with the plaintiffs, (whose rights may be considered as acquired under it and governed by it), was authorized to enter upon the lands and waters of any person, for the purpose of making examination and survey of its proposed road. And by § 22, the corporation was required to file a map or profile of the route of its intended road, duly certified, in every county named in its articles of association, before proceeding to construct any part of its road in such county. In addition to this map, the corporation was, by § 14, required to file a certificate of location in conformity with such map, signed by a majority of the directors, in and by which map and certificate, the line of the said railroad is to be designated and located. Upon the line thus fixed or located, the railroad company was entitled, by subdivision 4 of said § 28, "To lay out its road, not exceeding six rods in width, and for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the road." On the route of the proposed railroad of the company from Canandaigua to Niagara Falls, immediately upon the location of

[23] See also, Frost v. Galesburg, E. & E. R. Co., 167 Ill. 161; Beach v. Wakefield, 107 Iowa 567; Omaha & St. L. R. Co. v. Wabash, St. L. & P. R. Co., 108 Mo. 298; Hamlin v. European Ry., 72 Maine 83; Barnard v. Norwich & W. R. Co., 4 Cliff. (U. S.) 351; Central Trust Co. v. Kneeland, 138 U. S. 414.

"The ground of the doctrine is, that the mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being regarded as a trustee for him, in accordance with the familiar maxim, that equity considers that as done which ought to be done." Bailey, J., in Borden v. Croak, 138 Ill. 68, 75, involving a mortgage of future chattels.

The chief controversy in cases of this class is upon the question whether particular property comes within the description in the mortgage. See Jones, Corporate Bonds and Mortgages, §§ 99-113.

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such road, in manner aforesaid, a strip of land six rods in width was laid out and designated for the road of this company, of which it was entitled to take so much as it required for the use of the railroad, on making due compensation therefor. The company had, in effect, by its charter, a patent from the state to enter upon and appropriate such strip of land to its own use so soon as it had made due compensation therefor. Its right was absolute, subject only to that single reservation or condition, and the strip of land is clearly defined and designated by law. This strip of land is the land referred to in the plaintiff's mortgage, with sufficient particularity and definiteness to answer the rule in equity. This strip of land is particular land, in the language and sense of the rule in equity, as laid down in the case in Peere Williams and by Fonblanque. The description in the mortgage of the land acquired, and to be acquired, must be deemed to refer to the charter, and the law defines the land which the mortgage is designed to cover, and the lien of the mortgage clearly attached to such unacquired land so soon as the title thereto passed to the corporation. But if the rule be as some of the cases hold, that a disposition by deed, or mortgage, or assignment, of after acquired property, while it is inoperative as a conveyance of the title, may be considered as a declaration precedent, which will derive its effects from some new act of the party after the property is acquired. (Bacon's Max. Reg. 14. Sumner v. Thurston, 1 Man., Gran. & Scott 379). Then certainly the two subsequent mortgages executed by the railroad company, one September 16, 1853, and the other December, 1853, both after the road had been constructed and was in operation, and both containing an express reference to the plaintiff's mortgage, and both expressly covering all this property, and subjecting it in terms to the prior lien of such mortgage, must be deemed a sufficient act of new or further assurance or ratification to satisfy the rule in question.

But I think this mortgage covers and embraces the subsequently acquired lands upon another and distinct ground, independent of the rule in equity above referred to. The statute (Gen. Rail Road Act, Subd. 10, § 28) authorizes a railroad corporation, organized under such act, "from time to time, to borrow such sums of money as may be necessary for completing or finishing or operating their railroad, and to issue and dispose of their bonds for an amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purpose aforesaid." The mortgage in this case was made in pursuance and by virtue of this statute, and is clearly authorized by it. The charter of the Niagara Falls Rail Road Company was itself a franchise, and it included a right to enter upon and take lands for this railroad, and to construct and operate the road. The

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right to enter upon and take the particular lands required for the purpose of the railroad, was included and embraced in the mortgage, and is clearly conveyed and bound by it. The legislature authorized the corporation to mortgage their "franchises, together with their corporate property." All the rights and interests of the corporation were included in these words. I think the legislature intended to give authority, by this statute, to railroad corporations to mortgage all and singular the property of the corporation, with all its franchises, rights and interests acquired, and to be acquired, as an entirety, and that the mortgage in this case is of the whole railroad, and of all the real property of the corporation, and its entire franchises, in as full and complete a manner as the corporation could possess, exercise and enjoy such rights and franchises. In this aspect of the question it is therefore entirely immaterial whether the right of way for the railroad was all acquired or not, at the time the mortgage was put on record; and it is equally immaterial whether the road had or had not been at that time entirely located, or the location thereof, if previously made, was afterwards changed. The right to change its location was one of the chartered privileges of the corporation, and was embraced within the grant of its franchises. So also was the right to take such lands as might be requisite to complete the road upon its original, or upon any altered line. This point was so held by my brother Johnson in the case of John A. Stevens and others vs. The Buffalo, Corning and New York Rail Road Company, tried before him at special term at Corning, in November, 1856, as appears from notes of his decision furnished me by counsel, no opinion having been written by the judge. The question has been decided in the same way by the supreme judicial court of New Hampshire, in the case of Pierce and others v. Emery and others. In that case the Portsmouth and Concord Rail Road Company, under an act of the legislature, had mortgaged its road to secure bonds to the amount of $350,000. The mortgage conveyed all the real and personal estate of the corporation, with all rights, franchises, powers and privileges. It was held that the all rights, franchises, powers and privileges. It was held that the mortgage covered the whole railroad, with all its corporate rights and franchises, as an entire thing, including subsequently acquired property. In the case of Willinck v. The Morris Canal and Banking Co. (3 Green's Ch. Rep. 402), in the court of chancery of New Jersey, the chancellor asserts the same doctrine. In that case, under an act of the legislature of New Jersey, the Morris Canal Company had mortgaged its canal, then in course of completion from the Delaware to the Hudson river, with all and singular its property and franchises. The question was whether the mortgage covered the canal between Newark and Jersey City. The route had been surveyed, but the canal had not been excavated, or any of

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the lands purchased, till after the mortgage was given. The chancellor held that the mortgage embraced the entire canal and everything connected with it, including feeders, wharves, docks and piers, and all other appendages.[24]

The only remaining question to be now considered, relates to the branch track from the main track at Tonawanda to the Niagara river, or to the docks on the banks of the river. This branch was

[24] "This doctrine, that the mortgage of a railroad as an entire thing covers parts of the thing which have been acquired or constructed after its execution, so far as it relates to such after-acquired property as actually becomes a part of the original thing mortgaged, rests upon the doctrine of accession, which prevails in ordinary mortgages where improvements are made upon real estate mortgaged, which become a part of the realty, or where repairs are made on an article of personal property.

"The doctrine is not generally supported that after-acquired property of a railroad company passes, as incident to the franchise to acquire property, by a mortgage of the franchises and property of the company executed by lawful authority. This view was strongly urged upon the court in the case of Dinsmore v. Racine & Mississippi Railroad Company, 12 Wis. 649, but the court, after examining the grounds of the doctrine and some of the cases supporting it, declined to adopt it, and stated the objection to it. It is true that at that time there was no statute in force in Wisconsin authorizing a railroad company to mortgage its franchises, and it is admitted that a corporation would have no power to make a mortgage by which property after acquired would pass as incident to the franchise to acquire property, except by virtue of express legislative authority to convey the franchises of the corporation. None of the cases which support this doctrine do so upon the general principle that a railroad, with its franchises and property is an indivisible, entire thing, except as it becomes so by virtue of some special or general legislative authority. On general principles of law, a railroad corporation, with its franchises and property, though undoubtedly having many things peculiar to itself, can not be regarded as one entire and indivisible thing. It can not be likened to a machine, or to a vessel. If a mortgage which does not in terms include after-acquired property can be held to embrace property which is personal in its nature, and is not attached to the realty as fixtures, without a special statute manifesting an intention on the part of the legislature that such mortgage should pass the entire franchises and property of the company, and without any general law giving to a mortgage made by a railroad company greater effect than is given to a mortgage by a natural person, a revolution would be worked in the registry laws." Jones, Corporate Bonds & Mortgages, §§ 95, 97.

The principle of accession, while it may have been erroneously applied in the principal case, has an important place in mortgage law, giving rise to a class of cases which must be carefully distinguished from simple cases of after-acquired property. Such is the case of fixtures, annexed to mortgaged land; so the case of natural products of the soil; so that of the increase of mortgaged animals.

Another case which must be distinguished from the simple mortgage of future property, and which is related to the doctrine of accession, is that of the mortgage of property having a potential existence by reason of being the fruit of a thing owned by the mortgagor at the date of the mortgage, e. g., a mortgage of crops to be grown on the mortgagor's land, unconnected with any mortgage of the land.

The principal case is cited in Fisk v. Potter, 2 Keyes (N. Y.) 64, as

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not laid out at the time of the original location of the road, and obviously was not then projected or contemplated, at least at the place where it is now located. But I think it is covered by the mortgage, as an incident to the principal subject of the grant, upon the maxim "that whoever grants a thing is supposed tacitly to grant that without which the grant itself would be of no effect." (Broom's Legal Maxims 198, 11 Rep. 52.) When a thing is granted, all the means to attain it and all the fruits and effects of it, are granted also. (Shep. Touch. 89.) It is a rule of law that the incident passes by the grant of the principal (Broom 205) whatever is essential to the use and enjoyment of the principal thing. (4 Kent, 467).

Now the railroad company, most obviously, contemplated meeting the business of Lake Erie at Tonawanda, and expected to derive a large revenue from that source. The report of the president of the company, made in 1851, speaks of Tonawanda as being the best harbor on Lake Erie, and goes into a calculation in respect to the amount of business that will come to the railroad at that point. In another place in the report, speaking of Tonawanda, it states that "at this point the road will receive the traffic of the lake," and adds, that the imports of that harbor had amounted to nearly $100,000 in the year 1851, and describes the thriving village of Tonawanda in language well adapted, and doubtless designed, for a foreign market. But independently of this report and of all the evidence of a purpose or expectation on the part of the company to connect its road by a branch with the Niagara river at this point, the company had the undoubted right to do so, and what was so obviously for their interests the law will not presume that they would be likely to overlook. Tonawanda was an important point on the line of their railroad, doubtless the most important point between Canandaigua and the suspension bridge at Niagara. Perhaps more important even than its terminus at the suspension bridge. At such a point it is not to be intended or supposed that the railroad company would not construct a branch to meet the business designed for the railroad on the bank of the river, and make such erections and connections by branch and side tracks as should be adapted to facilitate and promote their convenience and interest in receiving freight from and delivering it to lake vessels in the harbor. The branch road is, therefore, in my opinion, a legitimate incident of the main road, as necessary or convenient for its use and enjoyment as sidetracks, turnouts, woodyards, shops

authority for the position that "The legal title of the land in question, upon which plaintiff's conveyance was made to the railroad company, vested in the latter. At the same instant, the lien of the mortgage which had before that been given by the railroad company, and which, before that time, remained but an equitable claim upon 'rights to be acquired,' became a vested legal right upon the premises in question."

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and engine houses, and it therefore passed with the grant of the railroad and its franchises, as an appurtenance—as a legitimate prospective incident to such road. But the railroad company, being bound to make further assurance, and this branch having been constructed before the second and third mortgages were given, and before any of the judgments of the defendants were recovered, I think the plaintiffs can hold it under their mortgage by force of the new declaration or assurance contained in these mortgages, as they may hold upon the same principle, the lands purchased for depots and station houses and the like uses. The defendant Hines sets up no equity that attaches to the right of way. The railroad company paid for the land on which the branch track is located, in its stock. The consideration for the judgment of the defendant Hinds is for labor, services and materials found in constructing such branch. He has no equity which can take priority over the plaintiffs' mortgage. As the plaintiffs have an equitable lien upon the railroad, its tracks and appurtenances, upon well settled principles, such lien must prevail over the lien of the judgment creditors. Courts of equity control judgments and enforce and protect the prior equitable title in preference to the judgment. (23 Eng. Ch. Rep. 561, 1 Paige 284, 3 Comstock 187, 3 Kernan 188.)

But the equitable rights of the plaintiffs only extend to the particular lands designated by statute, and which the company was authorized to take, and did take, for the use of its road. The railroad company, in addition to the right to lay out its road not exceeding the width of six rods, and to take the land therefor, and as much more as should be necessary for cuttings and embankments, was also entitled by subdivision 3 of § 28 "To purchase, hold and use all such real estate, and other property, as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the objects of its incorporation." Under this provision the company was authorized to purchase and hold such lands as were necessary for depots, stations, warehouses, woodyards, shops and other legitimate railroad purposes. All such lands, with the erections thereon, would pass to the complainants, under their mortgage, as part of the railroad, or as essential to its use and enjoyment. But lands acquired by the railroad company and not thus used or employed for railroad purposes, would not come within the description of the mortgage.

The particular lands which were to be acquired after the mortgage was put on record in the several counties through which the railroad passed, within the rule above stated, must necessarily be the lands designated by the statute for the railroad, and such as the company was authorized to acquire and take for its track and legitimate use, as above stated. These are embraced within the

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purview of the mortgage and nothing beyond. It is in proof that some of the lands purchased in Batavia have never been used for railroad purposes. That in some instances whole lots were purchased to secure a right of way across them. If the railroad company for this purpose had purchased a lot of ten or one hundred acres, it can not be that any more of such lots would be embraced in this mortgage to the plaintiffs than was actually taken and required for the road. In respect to all such lands outside of the legal limits of their railroad track and branches, and excepting land used for shops, depots, stations, turnouts for wood or water, or other legitimate purposes, the lien of the defendants' judgments must prevail. The plaintiffs have no legal or equitable lien upon such lands, and the lands are liable therefor to the legal claims of the other creditors of the corporation. It is not in proof with sufficient distinctness what lands were acquired by the company which, within the principle above stated, will not be covered by the plaintiffs' mortgage. It will, therefore, be necessary, in such decree as shall be made, to direct a reference, to ascertain what lands were owned by the railroad company which are subject to the lien of the judgments of the defendants, Hinds, Otis and Worthington, and to determine the relative rights of the defendants in respect to such lands, as among themselves; or to the proceeds of the lands, if the same or any part thereof shall have been sold.

The plaintiffs are entitled to a decree for a foreclosure of their mortgage for the amount due them, with costs, upon the whole railroad, its track, franchises and depots, and all its real property and appurtenances, upon the principles above stated.

Section 3.—The Debt.

HOFFMAN v. MACKALL.

Supreme Court of Ohio, 1855.
5 Ohio St. 124.

Bartley, J. This is a proceeding in chancery, instituted by the complainants as judgment creditors of Benjamin Mackall, to set aside a deed of conveyance, made by him to trustees, in contemplation of insolvency. The terms of the conveyance, the object of which is expressly declared to be the benefit of all the grantor's creditors, are expressed in the following language, to wit: "And to that full and complete extent the said trustees are hereby authorized and empowered to sell, either at public or private sale, and

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with such notice of sale, and in such manner, as they shall think most expedient and beneficial to my creditors, the above-described tracts of land. And out of the proceeds of said sales to pay as fast as they may be realized: 1. The costs of this assignment, and the reasonable costs, expenses, and compensation to the said trustees, of the execution and carrying into effect the trust aforesaid; 2. That they pay out the balance of said fund equally and pro rata, to all my creditors, in proportion to the amount of their respective demands, hoping and expecting that the trust fund hereby created will satisfy all my debts, leaving a balance, which said balance, should it arise, the said trustees are to pay over to the undersigned, B. Mackall, or his personal representatives." It appears that at the time of the execution of the deed, judgments were about to be taken against the grantor, one of which was for a security debt; and that he declared that he intended the conveyance to be security for his own debts, and not for his surety debts; and also that he desired by the conveyance to prevent a sacrifice, thinking that in the hands of trustees the property could be made to go further, etc.

The grounds upon which the complainants seek to set aside the conveyance are the following:

* * * * * * *

2. That the deed is a deed of trust, in the nature of a mortgage, which could not take effect until entered for record; that it was not entered for record until after the recovery of the judgments; and, therefore, that the judgments have the first lien.

* * * * * * *

2. There is a manifest and well-settled distinction between an unconditional deed of trust and a mortgage, or deed of trust in the nature of a mortgage. The former is an absolute and indefeasible conveyance of the subject-matter thereof, for the purpose expressed; whereas the latter is conditional and defeasible. A mortgage is the conveyance of an estate, or pledge of property, as security for the payment of money, or the performance of some other act, and conditioned to become void upon such payment or performance. A deed of trust in the nature of a mortgage is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to the trustee to sell the land and pay the debt in case of default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust the grantor parts absolutely with the title, which rests in the grantee unconditionally, for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts; while the former is a convey-

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ance in trust for the purpose of securing a debt, subject to a condition of defeasance. (Woodruff v. Robb et al., 19 Ohio 216, 1 Hilliard on Mort. 359.) It is manifest from this distinction that the conveyance in controversy, in this case was not a mortgage or deed of trust in the nature of a mortgage, but an absolute deed of trust; and therefore, that it took effect from the time of its delivery, on the 15th day of May, and prior to the recovery of the judgments by the complainants.

But even had it been a deed of trust in the nature of a mortgage, it would have taken effect on the 15th of May, for it was delivered for record on that day. The neglect of the recorder to mark the time of the delivery, because he did not know who would pay his fees, can not be allowed to defeat the delivery, for he ought to have made that objection when the deed was delivered to him; and not having made it then, it was too late to make it afterwards. The maxim of the law, that he who does not speak when he ought to speak shall not be permitted to speak when he would speak, would seem to be applicable in the case before us.

The deed became effectual the moment it was delivered, whatever may have been afterward done or left undone. It is immaterial, in this case, whether the deed was recorded in the proper book or not. An unrecorded deed is, of course, good, except as against subsequent bona fide purchasers. It may be added here that this deed, being an absolute and indefeasible conveyance in trust, and not in the nature of a mortgage, should have been recorded in the book denominated "record of deeds."[25]

* * * * * * *

HENLEY v. HOTALING.

SUPREME COURT OF CALIFORNIA, 1871.
41 Cal. 22.

William R. Storms was in the possession of two thousand acres of public land at Round Valley, Mendocino county, and gave to S. P. Storms a power of attorney, of which the following is a copy:

"Round Valley, 7th Oct., 1859.

"Know all men by these presents, that I, Wm. R. Storms, of Boston, County of Suffolk, State of Massachusetts, have made, constituted, and appointed and by these presents do make, consti-

[25] Compare Cadwell's Bank v. Crittenden, 66 Iowa 237; Comstock v. Stewart, Walker Ch. (Mich.) 110; Hart v. Blum, 76 Tex. 113; Grimes v. Malcolm, 164 U. S. 483. See also 5 Enc. L. & P. (New Am. & Eng.) 1009.

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tute, and appoint S. P. Storms, of Round Valley, County of Mendocino, State of California, my true and lawful attorney, for me, and in my name, place, and stead, to buy and sell all kinds of stock that is on my ranch in said Round Valley, or in the State of California; to buy and sell any claims of land in said valley or State; to buy or sell all kinds of merchandise, and to make contracts in any business that may occur to carry on my business in the State of California, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the whole State of California, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof."

On the 13th of December, 1860, the attorney in fact called upon defendant, Hotaling, and solicited a loan of five thousand dollars, and offered as security a mortgage on said land. Hotaling agreed to make the loan on the security, if his counsel approved of it; and Storms and Hotaling went to the office of his attorney, who advised that the power of attorney did not authorize S. P. Storms to negotiate a loan or execute a mortgage. Hotaling then declined to make the loan. S. P. Storms then offered to sell the land to Hotaling for five thousand dollars, and Hotaling accepted the proposition. S. P. Storms, as attorney in fact, then, on the 13th of December, 1860, executed to Hotaling a deed of the land, absolute on its face, and Hotaling paid him the five thousand dollars. Hotaling then executed to William R. Storms a bond, conditioned that if said Storms paid him five thousand dollars, with interest at three per cent. per month one year from date, he would convey the land to him. The bond provided, that until the payment of the money, it should remain in the custody of Hotaling's attorney as an escrow, and that if Storms failed to pay the money, the bond should be delivered up to Hotaling to be canceled. Hotaling, at the same time, gave S. P. Storms a lease of the land for one year. At the end of the year Storms refused to deliver up possession, and Hotaling recovered possession in an action for holding over contrary to the terms of the lease. In 1862, Wm. R. Storms, being indebted to the plaintiffs, executed to defendant Tevis a deed of the land in trust for the plaintiffs. The plaintiffs brought this action to have the deed to Hotaling canceled, and to obtain possession of the land, and a conveyance from Tevis, their trustee. Storms did not pay the five thousand dollars mentioned in the bond. Defendant, Hotaling, recovered judgment, and the plaintiffs appealed.

By the court, RHODES, C. J.:

Was the instrument which was executed by William R. Storms,

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by his attorney in fact, S. P. Storms, to Hotaling, what it purported to be, an absolute conveyance of the premises in controversy, or was it a mortgage? The court below found it to be the former, and the evidence was amply sufficient to justify the finding. The parties consulted the legal adviser of Hotaling, and by him they were informed that the letter of attorney did not empower the attorney in fact to execute a mortgage. Thereupon a proposition was made by one party, and accepted by the other, for a sale of the premises, and the deed and the other papers relating to the transaction between the parties were prepared and executed under the supervision of the same counsel; and in giving his testimony he says: "The parties gave me positive instructions to have it a sale, and not a mortgage, and if those papers make it anything else, then the papers did not perform the object of the parties and their transaction." The attorney in fact manifested some annoyance when informed that the power of attorney did not authorize him to execute a mortgage, and he suggested a sale, and the papers were drawn with that object. There can be no question, from the evidence, that the counsel who prepared the deed and the other papers relating to the transaction, understood from the parties that they desired a sale of the premises, and that they were prepared and executed under his direction, in the manner stated in the evidence, with the intent that the transaction should not, by construction, be held to amount to a mortgage.

When the intention of the parties to a deed, absolute in form, is sought to be ascertained, not in the usual way, by reading and construing the instrument, in connection with evidence to identify the subject-matter, the parties, etc., but by evidence to establish an equity beyond and outside of the deed, and thus to convert the deed into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage, otherwise the intention appearing on the face of the deed ought to prevail. There can be no question that a party may make a purchase of lands either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to reconvey the lands upon the payment of a certain sum, without any intention on the part of either party that the transaction should be, in effect, a mortgage. There is no absolute rule that the covenant to reconvey shall be regarded, either in law or equity, as a defeasance. The covenant to reconvey, it is true, may be one fact, taken in connection with other facts, going to show that the parties really intended the deed to operate as a mortgage, but standing alone, it is not sufficient to work that result. The owner of the lands may be willing to sell at the price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon specified terms; and if such appears to be the in-

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tention of the parties, it is not the duty of the court to attribute to them a different intention. Such a contract is not opposed to public policy, nor is it in any sense illegal; and courts would depart from the line of their duties should they, in disregard of the real intention of the parties, declare it to be a mortgage. "To deny the power of two individuals," says Chief Justice Marshall, "capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day; or, in other words, to make a sale with a reservation to the vendor, of the right to repurchase the same land, at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as infants." (Conway's Executors v. Alexander, 7 Cranch 237).

Conceding to parties the right to contract in that manner, it necessarily follows that something more than a reservation of the right to repurchase, or a covenant to reconvey, must be shown in order to convert an absolute deed into a mortgage. There is one fact which is indispensable for this purpose. A mortgage is a security for the performance of an agreement, which is usually to pay a sum of money. Leaving out of view other agreements than those for the payment of money, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money. If there is no debt there is no mortgage. We look in vain, in this case, to find any evidence of a promise on the part of Storms to repay the purchase money, or of the existence of a debt of any kind from him to Hotaling. The arrangement was, that Hotaling should execute a bond to reconvey the premises; but Storms did not agree to repurchase, and the bond was delivered as an escrow, and it remained an escrow until after the time therein mentioned for the execution of the deed, and was then canceled. If the deed was intended as a mortgage, the mortgagee would have a right of action to foreclose the mortgage; but if he had brought such an action, the answer that there was no promise, either express or implied, on the part of the alleged mortgagor, to repay the purchase money, would have been a complete bar. This case differs from Sears v. Dixon, 33 Cal. 326, in the important particular, that in that case the mortgagor covenanted to repay the purchase money at a fixed time, and, under the name of rent, to pay interest thereon at a stipulated rate. And the court also found that the parties intended to execute a mortgage; but in this case the court found that the parties intended the deed to be, in fact, as it was in form, an absolute conveyance.

* * * * * * *

Judgment affirmed.[26]

[26] To the same effect, Goodman v. Grierson, 2 Ball. & B. (Ireland)

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Mr. Justice Temple dissented; Mr. Justice Sprague did not express an opinion.

STORY, J., in FLAGG v. MANN, 2 Sumner 486 (U. S. C. C., 1837): Did, then, the transaction between the Richardsons and Walker and Fisher create mortgage in the premises? Some things are, to my mind, exceedingly clear. In the first place, the deed to Walker and Fisher, and the bond by them to Luther Richardson, are to be treated as part of one and the same transaction. They were, in my judgment, executed at the same time; and if not, at all events they were intended to be contemporaneous in their object and operation. Neither was to be of any force or validity without the other. The bond must have the same precise effect and construction, as if it were inserted in the body of the deed. If, by being so inserted, a mortgage could be created, it was equally created by its being in a separate instrument. In the next place, no consideration whatsoever was paid by Walker and Fisher to Luther or Prentiss Richardson, on account of the deed, at the time of the execution of it, or has been at any time since. It is true, that there is the consideration of the thousand dollars stated in the deed; but it was purely nominal. No person pretends, that that sum, or any other sum was in fact paid, or intended to be paid. If this were the whole case, the deed would be merely voluntary; and the question of a conditional purchase could never arise; for to constitute a conditional purchase, there must be a sale for a valuable consideration between the parties, with a right of repurchase. A mere gift would not raise the question; and, indeed, there is no pretense in the present case to say, that any gift was intended.

What, then, was the real consideration between the parties? To me it appears plain, that there was an agreement by Walker and Fisher, at the request and for the benefit of Luther Richardson, to pay off forthwith the incumbrance of Bennett on the premises, and thereby to save the equity of redemption from being totally extinguished. On the part of Richardson, there was an agreement to convey the premises to Walker and Fisher, to secure the payment of this advance and all other advances made by them towards the extinguishment of the antecedent mortgages and all expenditures in improvements with a right reserved to Richardson of reconveyance upon his repayment thereof within five years. This was the basis of the papers actually executed; and the whole transaction would

274; Hawke v. Milliken, 12 Grant Ch. (Canada) 236; Conway v. Alexander, 7 Cranch (U. S.) 218; Burgett v. Osborne, 172 Ill. 227. And see Page v. Foster, 7 N. H. 392, where the court stated a like doctrine upon a case where the transaction was in the form of a legal mortgage.

A mortgage may be made by A to B to secure a debt of C to B without any personal liability on the part of A. Spear v. Ward, 20 Cal. 659; Bartlett v. Bartlett, 4 Allen (Mass.) 440; Metz v. Todd, 36 Mich. 473; Heath v. Van Cott, 9 Wis. 516.

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otherwise be without any just aim or object. Bennett's title to the premises would become in a few days absolute, unless he was redeemed. Richardson was, notoriously, unable to redeem from his own funds, and that inability constituted the ground of the application to Walker and Fisher. It would have been the idlest of forms, and the most useless of contrivances, to shift the title from Prentiss Richardson to Walker and Fisher, if it was the design of all parties, that it should perish in the space of twelve days, without any attempt of redemption. The very nature of the transaction demonstrates to my mind that the redemption of Bennett by Walker and Fisher was the *sine qua non* of the whole arrangement. If there could be the slightest doubt upon this head from reading the testimony of Walker and Fisher, it would be entirely removed by the other evidence, and by admitted facts. Bemis says, that about the time the papers were finished, Bennett passed in the street, and was called in; and Walker and Fisher requested Bemis to ask Bennett to appoint a time, when they should meet him at Billerica, and pay him the money. He did so; and Bennett appointed the time. And on the day so appointed, Walker and Fisher, and Richardson, and Bemis met at Billerica, and the money was paid by Walker and Fisher, and the deed was accordingly executed to them by Bennett. This is as pregnant and conclusive a proof of the real nature of the transaction, as can be desired.

Upon this posture of the case, what ground is there to say that there was a conditional sale of the premises to Walker and Fisher? They paid nothing to Luther Richardson for any transfer of his right to them. They simply paid, at his request, a subsisting debt due from him to Bennett, and took a transfer from Bennett of his interest in the premises. Beyond this they paid nothing; and upon the reimbursement of this and all other advances, on account of the premises, within five years, the premises were to be restored to Richardson. It was in truth but the transfer of a debt from one creditor to another, with the assent of the debtor, expanding the equity to redeem the estate pledged for it from a few days to five years.

It has been said, that the true test, whether the conveyance in this case was a mortgage or not, is to ascertain, whether it was a security for the payment of any money or not. I agree to that; and indeed, in all cases the true test, whether a mortgage or not, is, to ascertain, whether the conveyance is a security for the performance or non-performance of any act or thing. If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage. If it be not a security then it may be a conditional or an absolute purchase.

It is said, that here there was no loan made, or intended to be made, by Walker and Fisher to Richardson; and that they refused

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to make any loan. There is no magic in words. It is true, that they refused to make a loan to him in money. But they did not refuse to pay for him the amount due to Bennett, and to take the premises as their security for reimbursement within five years.

It is said, that there is no covenant on the part of Richardson to repay the money paid, which should be paid by Walker and Fisher to discharge the incumbrances on the premises. But that is by no means necessary in order to constitute a mortgage, or to make the grantor liable for the money. The absence of such a covenant may, in some cases, where the transaction assumes the form of a conditional sale, be important to ascertain, whether the transaction be a mortgage or not; but of itself it is not decisive. The true question is, whether there is still a debt subsisting between the parties capable of being enforced in any way, *in rem or in personam*.[27] The doctrine is entirely well settled; and for this purpose it is sufficient to refer to Floyer v. Lavington (1 P. Will. R. 270, 271,) King v. King (3 P. Will. R. 360,) Longuet v. Scawen (1 Ves. R. 406,) Mellor v. Lees (2 Atk. R. 496,) Goodman v. Grierson (2 Ball & Beat. R. 278,) and Conway's Ex'rs. v. Alexander (7 Cranch R. 237,) out of many cases. Now, it seems to me clear, upon admitted principles of law, that, upon the payment of the money due to Bennett by Walker and Fisher, Richardson became their debtor for that amount, as it was paid at his request, and for his benefit. It is a common principle, that if A, at the request of B, pays a debt due by him to C, A may recover the amount in assumpsit for money paid to his use, or for money lent and accommodated. In my judgment, that is the very case at bar.[28]

[27] "I do not appreciate the force of the argument, that because the notes were given up, the debt was extinguished. For the purpose of regulating the amount to be paid on the redemption the debt was to be kept on foot, and the amount is specified in the agreement. It is not essential that the personal remedy against the mortgagor should be preserved. There is a debt quoad the redemption, but not in respect to the personal remedy." Denio, V. C., in Holmes v. Grant, 8 Paige (N. Y.) 243, 251. The decision of the Vice-Chancellor that the transactions in that case amounted to a mortgage was reversed by the Chancellor, who said, inter alia, "If the consideration paid is about the fair cash value of the property, the fact that there was no contract for the re-payment of the purchase money and interest which was binding upon the person making the conveyance, so as to make his general right to redeem as a mortgagor, and the corresponding right of the grantee to recover back his money instead of keeping the land, mutual and reciprocal, is a strong circumstance in favor of construing the contract to be a conditional sale and not a mortgage."

[28] Cf. Campbell v. Dearborn, 109 Mass. 130, holding that an advance of money by the grantee to the grantor created a debt upon an implied assumpsit.

In King v. King, 3 P. Wms. 358, it was said, "Every mortgage implies a loan, and every loan implies a debt; and though there were no covenant

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If it should be asked, why no personal obligation was given by Richardson, on this occasion, to pay the money, it might be answered, that the whole circumstances of the present case show an extreme looseness in the transaction of business between the parties; and considering, that much of it was done by the advice and with the assistance of counsel, it is not very creditable to the skill and diligence of the profession. The negotiations between Flagg and Mann and Richardson evince a most obstinate carelessness in the draft and execution of important instruments, leaving much to personal confidence, and the imperfect recollections of the parties, as well as that of the witnesses. And there is no ground for surprise in finding the same laxity pervade the arrangements of Richardson with Walker and Fisher. But the satisfactory answer is, that Richardson was poor and embarrassed, and Walker and Fisher relied on the premises for a full indemnity and satisfaction of all their advances, believing that Richardson would never be able to

or bond, yet the personal estate of the borrower of course remains liable to pay off the mortgage." See also, Brown v. Dewey, 1 Sandf. Ch. (N. Y.) 56, 73.

"A mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment has not been given, the remedies of the mortgagee are confined to the property mentioned in the mortgage." 4 Consol. Laws of N. Y. (1909) Chap. 50 § 249. This statute is copied in several states.

"The counsel for plaintiff urges that the statute only applies to cases where the action is based upon the mortgage, but has no bearing where it is prosecuted upon the original undertaking. If this rule is allowed to obtain, it is difficult to see what point is gained by the statute. In every case where a mortgage is given to secure a loan or other debt, if the mortgage does not become the sole security, and the mortgagee may have a personal judgment, as well as the mortgage security, he gains precisely the same end that he would if permitted to recover upon an implied covenant in the mortgage. * * * It is hardly necessary to enumerate the many instances in which statutes have been passed avoiding the assumption of liabilities by parol, where they formerly existed, as they are familiar. We think this act is of the same character, and that when a party takes security upon land by mortgage for a debt or other liability, without a covenant to pay, and takes no bond or other separate instrument to secure such payment, he is confined to the land mentioned in the mortgage." Flandrau, J., in Van Brunt v. Mismer, 8 Minn. 232 (Gil. 202).

"The statute seems to be aimed against sustaining an action for a debt secured by mortgage merely by the production of the mortgage, when it contains no express covenant to pay the debt. It sets out with the declaration that no mortgage shall be construed as implying a covenant, etc., and what follows seems to be intended to carry out that principle. That a personal action can be maintained for a mortgage debt when proved by competent evidence, whether in writing or by parol, can not be questioned." Wheeler, J., in Demond v. Crary, 9 Fed. 750, 752.

See also, Gaylord v. Knapp, 15 Hun (N. Y.) 87.

It is common practice, even when the mortgage is collateral to a note or bond, to insert in the mortgage a covenant to pay the debt.

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redeem. They were indifferent about the personal obligation, as they possessed an adequate fund in their own hands.

MATTHEWS v. SHEEHAN.

COURT OF APPEALS OF NEW YORK, 1877.
69 N. Y. 585.

EARL, J. In December, 1869, an arrangement was made between the plaintiff's testator, O'Keefe, and the defendant, whereby O'Keefe was to procure a policy of insurance on his life from the Phoenix Life Insurance Company, and assign it to the defendant, who was to pay the premiums and have the benefit of the policy, with the understanding that, if at any time O'Keefe desired to redeem the policy, he could do so by paying the premiums advanced by defendant, with the interest thereon. In pursuance of this arrangement, O'Keefe procured the company to issue a policy on his life, which was immediately assigned to the defendant by an assignment absolute in form, and he paid all the premiums to the time of O'Keefe's death in 1874. Before that time, O'Keefe, for the purpose of redeeming the policy, offered to pay the defendant the amount advanced by him for premiums, and defendant refused to take the money. After the death of O'Keefe, the defendant received from the issurance company the amount insured, and retained the same, refusing, upon plaintiff's demand, to pay any portion thereof to her. This action was brought to recover the sum received by the defendant, less the amount for which he held the policy as security. Upon the trial, the facts above stated appearing, and there being no conflicting evidence, the court directed a verdict for the plaintiff.

The verdict was properly directed. Upon the undisputed evidence, O'Keefe had the option to treat the policy as a security for the premiums paid by the defendant, and to redeem the same. While O'Keefe was not bound to redeem, or personally liable for the money advanced by the defendant, there was sufficient consideration for the arrangement made. O'Keefe submitted to examination, procured his life to be insured, and assigned the policy to the defendant in consideration that the defendant would pay the premiums, and give him the option to redeem. The substance and legal effect of the transaction was to make the defendant a mortgagee of the policy to secure him for the premiums paid, and he could not claim an absolute title thereto, except upon O'Keefe's failure

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to exercise his option to redeem. This was not simply an agreement by the defendant to sell to O'Keefe, upon payment by him of the amount of the premiums advanced with interest, a policy absolutely belonging to the defendant, an agreement void under the statute of frauds; because there was no writing or part payment. It was an agreement that the defendant might take and hold the policy as security and the right to redeem attended the policy into the defendant's hands, and at all times affected his title. Such an agreement may be shown by parol, although the assignment be absolute in form. (Hodge v. The T. M. and T. Fire Ins. Co., 8 N. Y., 416; Despard v. Walbridge, 15 N. Y., 374; Horn v. Keteltas, 46 N. Y., 605; Hope v. Balou, 58 N. Y., 380.)

It matters not that O'Keefe did not absolutely promise to pay the amount which defendant should advance for the premiums. To constitute a valid mortgage, it is not essential that the mortgagee should have any other remedy but that upon his mortgage. This is recognized by the Revised Statutes in reference to real estate mortgages (1 R. S. 739), which provide that when there shall be no express covenant in the mortgage for the payment of the money received, and no bond or other separate instrument to secure such payment, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage. In all cases the remedy of the mortgagee may by the agreement of the parties be confined to the mortgage.

It is sometimes difficult to determine whether a transaction constitutes a mortgage or an absolute sale and a conditional resale; and whether it shall be construed to be one or the other depends upon the intention of the parties as evidenced by the instrument executed, and all the circumstances of the case. No general rule upon the subject can be laid down which will govern all cases, although it is said that the fact that there was no debt which could be personally enforced is a strong, but not an absolute controlling circumstance, that the transaction was not a mortgage, but a sale and a conditional resale. In all doubtful cases a contract will be construed to be a mortgage rather than a conditional sale, because in the case of a mortgage the mortgagor, although he has not strictly complied with the terms of the mortgage, still has his right of redemption; while in the case of a conditional sale, without strict compliance, the rights of the conditional purchaser are forfeited. (Longuet v. Scawen, 1 Ves. Sen., 402; Glover v. Payn, 19 Wend., 578; Conway's Exrs. v. Alexander, 7 Cranch, 218; Edrington v. Harper, 3 J. J. Marshall, 354; Floyer v. Lavington, 1 P. Wms., 268; Chapman's Admin'x. v. Turner, 1 Colls. R., 280; Wharf v. Howell, 5 Binney, 499.) In Floyer v. Lavington, it is said: "As to the objection that here was no covenant for the

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payment of the principal or interest, that was not material; the same not being necessary for the making of a mortgage, nor yet necessary, that the right should be mutual, viz: for the mortgagee to compel the payment as well as for the mortgagor to compel a redemption; since such conveyance as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage." In Brown v. Dewey (1 Sandf. Chy. R., 56), it was held that "the absence of the personal liability of the grantor to repay the money is not a conclusive test in deciding whether the conveyance is absolute or is intended as a security." In Holmes v. Grant (8 Paige, 243, 257), Denio, V. C., says: "It is not essential that the personal remedy against the mortgagor should be preserved. There is a debt quoad the redemption, but not in respect to the personal remedy." In Flagg v. Mann (14 Pick., 467), Putnam, J., says: "There was no collateral undertaking on the part of Luther (the grantor) to pay the money which Walker and Fisher (grantees) should advance in the five years; so there was no mutuality. And this fact, though not conclusive, is to be taken into consideration in ascertaining whether the transaction was a mortgage or a sale, with a contract for a repurchase upon strict terms." (See also Rice v. Rice, 4 Pick., 349.) In Kerr v. Gilmore (6 Watts, 405), Kennedy, J., says: "The want of a personal security for the repayment of the money has, taken in connection with other circumstances, been regarded as tending to show that a defeasible purchase and not a mortgage was intended, but this circumstance alone has never been held sufficient to prevent a redemption." Again, "that the mortgagee should have a remedy against the person of the mortgagor also, in order to make the conveyance a mortgage, is more than I can assent to."

In Brown v. Dewey, (2 Barb., 28), the Supreme Court had under review the decision of the Vice Chancellor, whose opinion is reported 1 Sandf. Chy. R., 56, and his decree was reversed, not upon the law but upon the facts. The court was very much influenced by the consideration that to hold the contract there to be a mortgage, would render it void for usury. Harris, J., says: "Although it is true that courts of equity lean strongly in favor of the right of redemption, and for this reason in doubtful cases contracts of this description have frequently been construed as mortgages rather than conditional sales, yet when the aid of the court is sought, not to establish a right of redemption, but to have a conveyance declared a mortgage for the purpose of avoiding it on the ground of usury, the reason why in doubtful cases the court should incline to hold the conveyance to be a mortgage seems to fail. On the contrary, it seems to me that before giving to a transaction a construction which should have the effect to create a forfeiture of the se-

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curity, a court of equity ought to be well satisfied that such construction does no violence to the intention of the parties themselves. It is the right of redemption in favor of which the court leans in doubtful cases, and not the right to have the security avoided on the ground of usury." He further says: "I do not say that either of these circumstances (among them being the one that the grantee could not enforce payment of the money against the grantor personally) is to be regarded as a decisive test upon the question whether a transaction, doubtful in its character, is to be regarded as a mortgage or a conditional sale. On the contrary, I admit that neither adequacy of price nor the want of an obligation to repay the money, nor even both circumstances combined, are to be held as conclusive evidence that a conditional sale and not a mortgage was intended. Both, however, are important circumstances in determining the question." In Horn v. Ketaltas (supra), Allen, J., says that the circumstances that there was no agreement to pay the money secured, is one entitled to considerable weight in determining whether a conveyance was intended as a mortgage, but that it is only one of the circumstances to be considered and not conclusive; and Ch. J. Marshall, in Conway's Exrs., v. Alexander (7 Cranch, 218), says: "The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance."

It is clear therefore both upon principal and authority that the circumstances that O'Keefe was not personally obligated to pay to the defendant the amount of the premiums which he should advance is not absolutely controlling upon the question whether here was a mortgage or a sale and a conditional resale. It is an important circumstance in such cases and in the conflict of evidence not unfrequently a controlling one. There are many cases, some of which are cited by the learned counsel for the appellant, in which it has been held to be not as matter of law conclusive, but as matter of fact decisive. If we should hold this to be a case of conditional resale, and that the consequence follows which has been so learnedly argued on behalf of the defendant that the agreement is void under the statute of frauds, the intention of the parties would be defeated. This is therefore a case where the court should learn to hold the transaction to constitute a mortgage, thus giving what was clearly intended, the right of redemption.

There was nothing said about a re-purchase or a re-sale, or a re-assignment, but the right to redeem was expressly stipulated. The language used shows that the parties intended that the policy should be held as security for the premiums paid. Such a construction is at least as admissible as any other, and hence the court did not err in directing a verdict for the plaintiff.

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I have treated the transaction as a mortgage, but it is unimportant to determine whether it was a mortgage or a pledge, as the same course of reasoning would apply and the same consequences would follow, whether it was one or the other.

The judgment must therefore be affirmed.

All concur.

Judgment affirmed.[29]

ROBINSON v. WILLIAMS.

COURT OF APPEALS OF NEW YORK, 1860.
22 N. Y. 380.

Action by the receiver of the Hollister Bank, against Williams, the receiver of the Reciprocity Bank, and other defendants, for the foreclosure of a mortgage. Prior to September, 1857, both banks were doing business in the city of Buffalo.

Upon the trial these facts were proved: On the 24th of October, 1854, the defendants Gibson and his wife executed and delivered a mortgage to the Hollister Bank, which recited that in consideration of the sum of $1 to them in hand paid, and for the purposes thereinafter declared and stated, they granted and conveyed to said bank certain premises therein particularly described. The mortgage con-

[29] See also, Hickox v. Lowe, 10 Cal. 197; Mills v. Darling, 43 Maine 565; Campbell v. Dearborn, 109 Mass. 130; Cook v. Johnson, 165 Mass. 245; Fisk v. Stewart, 24 Minn. 97; Niggeler v. Maurin, 34 Minn. 118; Brant v. Robertson, 16 Mo. 129; Mooney v. Byrne, 163 N. Y. 86; Russell v. Southard, 12 How. (U. S.) 139.

Cf. cases in which the personal remedy is barred by bankruptcy or the statute of limitations, post, Chap. VII.

Where there is an absolute conveyance and contract for reconveyance, the existence or non-existence of a personal obligation on the part of the grantor to repurchase is the most important of the several circumstances which fix the legal nature of the transaction as a mortgage or a conditional sale. Conway v. Alexander, 7 Cranch (U. S.) 218; Campbell v. Dearborn, supra; Brant v. Robertson, supra; Holmes v. Grant, 8 Paige (N. Y.) 243; Glover v. Payn, 19 Wend. (N. Y.) 518.

Other circumstances bearing upon the question are, (1) the character of the negotiations leading up to the transaction; (2) the adequacy of the consideration, as a fair purchase price; (3) the possession following the transaction. See Jones, §§ 256-281.

It has been frequently said that equity leans toward the mortgage construction, as that least likely to work injustice, but on the other hand it has been said that, the transaction appearing upon its face to be a conditional sale, very clear evidence is necessary to convert it into a mortgage. Jones §§ 260, 279.

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tained a further recital as follows: "Whereas, it is contemplated that the said party of the second part will hereafter from time to time make loans or advances, by way of discount or otherwise, to the said Charles D. Gibson, upon drafts, bills of exchange, promissory notes and commercial paper, either made and drawn, or accepted or indorsed by said Gibson, and it has been agreed that these presents shall be executed to indemnify and secure the said party of the second part on account of any such loans, advances or discounts. Now therefore the condition of these presents is expressly this: that if the said Charles D. Gibson, his heirs, etc., shall and do well and truly pay, retire and take up at maturity any and all such drafts, bills of exchange, promissory notes or commercial paper, as may be discounted or advanced upon by the said party of the second part, for or to the said Gibson, and shall well and truly pay at maturity all and any such loans, discounts or advances, as above recited, and shall well and truly indemnify pay and save harmless the said party of the second part from and against all loss, costs, damages, expenses and interests by reason thereof, then these presents shall cease and be null and void." But in case of the non-fulfillment of the above conditions, then the party of the second part was authorized to sell the mortgaged premises and to make and execute to the purchaser a deed therefor.

The mortgage was duly acknowledged on the 25th of October, 1854, and recorded on that day in the clerk's office of Erie county. On the 1st of December, 1855, the defendant Gibson drew his bill of exchange on one Greenleaf, at Boston, whereby he requested said Greenleaf to pay to his own order the sum of $2,500, sixty days from the date thereof; and before said bill became due and payable Gibson indorsed the same to the Hollister Bank, which, on the faith and security of said bill and said mortgage, discounted the same and advanced to said Gibson the amount thereof. This bill was protested at maturity, and no part thereof has ever been paid. On the 29th of December, 1855, Gibson drew another bill of exchange on Greenleaf at sixty days from date, whereby he requested him to pay to his (Gibson's) order, the sum of $1,800.

Before this bill became due, Gibson indorsed it to the Hollister Bank, which discounted it and advanced to him the amount thereof, on the faith of said bill and the mortgage. This bill was also protested at maturity, and no part thereof has been paid.

The complaint set up that the defendant Williams, among others, claimed some interest in the mortgaged premises, and prayed the usual judgment of foreclosure and sale, and that said defendant, and all others claiming interest therein subsequent to that of the Hollister Bank, might be barred and foreclosed. The defendant Will-

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iams set up and proved that, on the 29th of January, 1856, the Sackett's Harbor Bank (whose name was subsequently changed, by an act of the legislature, to that of the Reciprocity Bank), recovered a judgment against said Gibson to the amount of $2,798.29; that a transcript thereof was duly docketed in the clerk's office of Erie county on that day; that said Gibson was then the owner of said mortgaged premises; and Williams insisted that said judgment was a lien on said premises, and prior to that of the mortgage. Neither of said bills of exchange were due at the date of the recovery of said judgment. The Superior Court of Buffalo, at special term, gave judgment in favor of the plaintiff, and declared said mortgage to be a prior lien to said judgment. On appeal, the same was affirmed at general term, and from that judgment the defendant Williams appealed to this court.

DAVIES, J. There can be no doubt that, as between the original parties to this mortgage, the validity of it, as a pledge of the mortgaged premises to secure the amount of these two drafts, could not be questioned. It was clearly the intent of the parties that the land described should stand as security for all advances and discounts made by the Hollister Bank to Gibson. If, therefore, there were no legal mortgage, there was, undeniably, an equitable one, which a court of equity would enforce against the original parties to it, and all others not in the condition of bona fide purchasers or subsequent incumbrancers without notice. The advances made to Gibson were before the recovery of the Reciprocity Bank's judgment. As soon as the advances were made, they were embraced in and secured by the mortgage. That judgments and mortgages may be taken to secure future advances, though no present indebtedness was subsisting at the time of their execution or rendition, has long been well settled. (Conrad v. The Atlantic Ins. Co., 1 Peters, 386; Leeds v. Cameron, 3 Sumn., 488; Hubbard v. Savage, 8 Conn., 215; Walker v. Snediker, 1 Hoff. Ch., 145; Com. Bank v. Cunningham, 24 Pick., 270; Monell v. Smith & Jenkins, 5 Cow., 441; Lyle v. Ducomb, 5 Bin., 585; 4 Kent's Com., 175; Lansing v. Woodworth, 1 Sand. Ch., 43; Barry v. Merchants' Ex. Co., 1 *id.*, 314; United States v. Hooe, 3 Cranch, 73; Livingston & Tracy v. McInlay, 16 Johns. 165; Truscott v. King, 2 Seld., 147.)

In Conrad v. The Atlantic Insurance Company (supra), a mortgage was given to secure a debt upon a respondentia bond, and it was said that the debt was of too contingent a nature to uphold a mortgage as collateral security for the payment of it. Story, J., at page 448, says: "We know of no principle or decision that justifies such a conclusion. Mortgages may as well be given to secure future advances and contingent debts as those which already exist and are certain and due."

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The case of Hooe v. United States (supra), is, in some respects, not unlike the present. There, one Fitzgerald conveyed property in trust to W. & J. C. Herbert, to indemnify Hooe for all indorsements or liabilities he might incur on behalf of Fitzgerald; and if Fitzgerald should pay and discharge all such liabilities, the trustees were to reconvey the property to him; but if Hooe should pay any such liabilities on account of Fitzgerald, then, on demand of Hooe, the trustees were to sell the trust property, and pay and satisfy the amount demanded by Hooe. Hooe became liable to pay several notes of Fitzgerald, indorsed by him, and on Fitzgerald's death he was largely in arrears to the United States, and they claimed a preference over all other creditors, under the laws thereof, and that such lien was superior to that created by the trust deed for the benefit of Hooe, and that it was fraudulent as to the United States. It will be observed that, in this case, no sum certain, for which the property was held in trust, was mentioned in the deed. Marshall, Ch. J., in delivering the opinion of the court, says (p. 88): "That the property stood bound for future advances is, in itself, unexceptionable. It may, indeed, be converted to improper purposes, but it is not positively inadmissible. It is frequent for a person who expects to become more considerably indebted to mortgage property to his creditors as a security for debts to be contracted, as well as that which is already due. All the covenants in this deed appear to the court to be fair, legitimate, and consistent with common usage."

It is pressed upon us that this mortgage is invalid, because no sum certain is mentioned therein. There might be some force in the argument if the Reciprocity Bank stood in the position of a subsequent purchaser or incumbrancer in good faith, although it will be attempted to be shown that the mortgage would be good as against the bank, even if such were its position. That question will be considered hereafter. The Supreme Court of this state, in the case of Monell v. Smith (supra), held that a surety, who held a bond and warrant of attorney, conditioned to pay all notes theretofore or thereafter to be indorsed, and to indemnify him against such indorsements, might enter up judgment and issue execution thereon for the sum for which he was actually liable, although the bond was not for a specified sum. That a bond and warrant of attorney might be taken by a surety, to secure him against future liabilities to be incurred by him, the court say, is warranted by the cases cited and considered by the late Chancellor in Roosevelt v. Mack (6 Johns. Ch., 266, 279-285). The court adds, "the only question is, whether the same course may be pursued where the bond relates in general terms to liabilities as surety or indorser, past and prospective, without mentioning a sum certain;

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and we think it may. It is true, the sum does not appear on the face of the bond; and there is no doubt that, in an action on such bond, breaches must be assigned. It would be the same, however, we think, as to a bond conditioned to pay specified sums to third persons. The certainty is the same in both cases. In both, we may be obliged to look beyond the face of the bond to see what is due. In a technical sense that is certain which may be made certain. We all know the objects of the parties to these instruments. It is, to afford the most prompt indemnity."

In Shiras v. Craig (7 Cranch, 34), the subjejct under consideration seems to have elicited a very full examination; and it was there held, that it was not necessary to the validity of a mortgage that it should truly state the debt it is intended to secure, but it shall stand as a security for the real, equitable claims of the mortgagees, whether they existed at the date of the mortgage or arose afterwards upon the faith of the mortgage, before notice of the defendant's equity. Chief Justice Marshall, in delivering the opinion of the court, at page 50, says: "It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000, due to all the mortgagees. It was really intended to secure different sums, due at the time to particular mortgagees, advances afterwards to be made and liabilities to be incurred to an uncertain amount. It is not denied that a deed which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real, equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation." These principles, and the cases upon which they rest, have lately been emphatically affirmed by the Supreme Court of the United States, in Lawrence v. Tucker (23 How., 14).

I arrive, therefore, to the conclusion, that this is a valid mortgage as between the parties to it, and that the mortgagee was secured thereby the amount of the advances upon the two drafts mentioned in the complaint, although no sum certain was mentioned on the face of the mortgage. These advances were made prior to the recovery of the judgment of the Reciprocity Bank, and prior, therefore, to any equities of that bank. It follows, therefore, they were made prior to any notice to the Hollister Bank of any such equities. No notice could be given of that which had not an existence. It is established then, it is submitted, that, at the date of

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the recovery of the judgment by the Reciprocity Bank against Gibson, the Hollister Bank had a good legal, and certainly equitable, mortgage upon the premises, to secure the amount of the two drafts already referred to. Was that judgment a prior lien to the mortgage? The judgment became a lien, at the time it was docketed, upon the interest of the defendant therein in all lands in the county of Erie. (2 R. S., 359.) In equity, the land was undeniably bound to pay off the amount of these two drafts. The law is well settled, that the equitable mortgage is entitled to a preference over subsequent judgment creditors. (Matter of Howe, 1 Paige, 129, and the cases there cited; Willard's Eq. Jur., 441, 442; Rockwell v. Hobby, 2 Sand. Ch., 9; Hilliard on Mortg., vol. I, 451.) If this mortgage is to be regarded simply as an equitable mortgage, there can be no question that, in accordance with well-settled rules of law and a uniform current of decision, it is a valid security, and is entitled to priority over the subsequent judgment of the Reciprocity Bank.

But, I think, if that bank had been a purchaser on the day of the recovering of its judgment, or an incumbrancer by way of mortgage for money then advanced, the mortgage of the Hollister Bank would equally have been entitled to priority. The recording of the mortgage was notice that the Hollister Bank had a mortgage on the premises for the purposes therein specified. There was enough to have put a bona fide purchaser or incumbrancer upon inquiry; and an application to the Hollister Bank would have disclosed the sum certain for which the security was held. As was said by the Supreme Court in Merrell v. Smith (supra), "we may be obliged to look beyond the face of the bond to see what is due. In a technical sense, that is certain which may be made certain." The precise sum for which the mortgage was held as security might, at any time, readily and with certainty, have been ascertained, and a bona fide purchaser or incumbrancer, with the notice which the record of this mortgage furnished him, if he had omitted to make the inquiry which it indicated, could hardly have claimed to have been a bona fide purchaser or incumbrancer. The authorities bearing on this question of notice are fully reviewed in the case of Williamson v. Brown (15 N. Y., 354), and the result of them stated as follows: "The true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a bona fide purchaser." But we are not without direct authority on the point now under consideration. The case of Kramer v. The

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Trustees, &c., of the Farmers' Bank of Steubenville (15 Ohio, 253), is of this character. The question there was, originally, whether mortgages given to one Doyle, in May, 1840, were to have priority over those given to one McDowell, which, though dated prior to Doyle's mortgage, were not recorded until 30th September, 1842. The mortgage to Doyle specified no sum in it, but the condition was, "that, whereas the said Alexander Doyle had theretofore indorsed paper of the said Wells, Henry & Co. (the mortgagors), and had also promised to make further indorsements, it was provided that if the said Wells, Henry & Co. should indemnify and save harmless the said Doyle, then the said deed was to be void," &c. Doyle alleged that, relying on this indemnity, he had continued to indorse for the mortgagors, and claimed that his mortgage was a prior lien to that of McDowell and of the judgment creditors. The court sustained Doyle's claim, and directed a sale of the property mortgaged, and that he be paid the amount of his liabilities. Kramer and others, judgment creditors, filed a bill of review, claiming that the court had erred in giving validity and priority to Doyle's mortgage. Among other things, they alleged that Doyle's mortgages were not good and valid as against the complainants, because they were void for uncertainty, and it could not be ascertained how or when the same became forfeited, or how the same could or would be satisfied. In the opinion, at page 260, the court say, "Doyle had a right to ask indemnity, and the mortgagors had a right to give it. It was done by way of mortgage; and although these mortgages were intended to cover subsequent as well as previous liabilities, they could not, on this account, be objectionable as between the parties. If, during the existence of these mortgages, a third person had recovered a judgment against the mortgagors, the lien of such judgment might, and probably would, have been preferred to the lien of the mortgagees for liabilities subsequently incurred by Doyle. But these complaints are not in that situation. The liabilities of Doyle had been fixed before the rendition of their judgment. It is not perceived that there would be any difficulty in ascertaining when the condition of the deeds was broken and the mortgage forfeited, nor as to the manner in which they could be satisfied. A similar rule may be deduced from the following cases in Connecticut: Merrill v. Swift (18 Conn., 266); Lewis v. De Forest (20 *id.*, 442); Ketchum v. Jauncey (23 *id.*, 127).

In any aspect in which this case may be regarded, we think it

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free from doubt, and that the judgment appealed from should be affirmed, with costs.

All the judges concurring.

Judgment affirmed.[30]

GRIFFIN v. NEW JERSEY OIL CO.

COURT OF CHANCERY OF NEW JERSEY, 1855.
11 N. J. Eq. 49.

THE CHANCELLOR (WILLIAMSON). This bill is filed upon a mortgage given by the New Jersey Oil Company to the complainant. The other defendants are made parties to the suit, by reason of their claiming liens upon the mortgaged premises. The difficulties all arise in reference to the validity of the complainant's mortgage, and as to its priority over the liens set up by the defendants.

* * * * * * *

The mortgage is further objected to, on the ground that at the time of its execution the debt due was only $1,243.90, and the residue was for future advances; that this does not appear upon the face of the mortgage, but on the contrary, the mortgage declares that the debt then due was ten thousand dollars. It is insisted that

[30] "It is the policy of our laws, and experience has demonstrated the wisdom of it, that the titles to real estate should be registered, for the benefit, not of the parties, but of creditors, and all others interested. 'All grants and mortgages of houses and lands shall be recorded at length by the town clerk; and no deed shall be accounted good and effectual to hold such houses and lands, against any other person or persons, but the grantor or grantors, and their heirs only, unless recorded as aforesaid.' Stat. 302, § 9. It is the object of this law to prevent fraud and give security and stability to title. It results, unquestionably, that the condition of a mortgage deed must give reasonable notice of the incumbrances on the land mortgaged. A creditor is not obliged by law to make inquiry in pais, concerning the liens on the property of his debtor; but on application to the record, he may acquire all the information, which his interest demands. At least, he must have the power of knowing from this source, the subject matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result. And what is not of less importance, the incumbrance on the property must be so defined, as to prevent the substitution of everything, which a fraudulent grantor may devise, to shield himself from the demands of his creditors." Hosmer, Ch. J., in Pettibone v. Griswold, 4 Conn. 161, 162.

Compare, Garber v. Henry, 6 Watts (Pa.) 57; Brewster v. Clamfit, 33 Ark. 72; Joseph v. Lyon, 9 Ky. L. 324; Hyland v. Habich, 150 Mass. 112; Michigan Ins. Co. v. Brown, 11 Mich. 265; Hyde v. Shank, 77 Mich. 517; Witczinski v. Everman, 51 Miss. 841; Youngs v. Wilson, 27 N. Y. 351; McDaniels v. Colvin, 16 Vt. 300.

In some jurisdictions the question is affected by statute. See Jones, § 366.

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a mortgage under such circumstances is not valid, because it is a fraud upon creditors.

This is not a new question. It has been much discussed, and has been frequently reviewed by the courts. Such a mortgage was sustained in the case of Craig v. Tappen, 2 Sand. Ch. Rep. 78. Numerous authorities are there cited and reviewed. The court said, "it is no longer a question that mortgages to secure future advances are good to the extent secured thereby;" and further declared, that it is not necessary that the intention should be expressed in the mortgage. The authorities settled the question, and I am not disposed to disturb them. And yet it appears to me there are very weighty objections to a mortgage to secure future advances, unless it is so expressed on the face of the mortgage. The instrument declares, under the seal of the party, that the debt is actually due. It is placed on the record as an encumbrance, for the whole amount, on the debtor's property. Why should not the mortgage declare the true consideration for which it has been executed? It may operate greatly to the prejudice of creditors. It does deceive and mislead them when they apply to the records for the purpose of ascertaining the condition of their debtor's property. They find it encumbered for more than its value, and the encumbrance stands there to enable the debtor to obtain money which ought to go to pay his debts already contracted. It was said by the Assistant Vice Chancellor, in the case of Craig v. Tappan, that the record would not in any case afford the creditor any certainty, and that he may make application to the mortgagee to ascertain whether all or how much of the money is due. But the mortgagee may not be easy of access, and the creditor not be able to avail himself of the necessary information. He finds an encumbrance on record for as much as the debtor's property is worth, and thinks it useless to take legal means to secure his debt; whereas, if the mortgage had truly expressed the debt actually due, the creditor might have secured his debt. It is calculated to put a creditor off his guard—it is calculated to mislead him, and is therefore objectionable. He is misled by the party's executing a paper which is false upon its face, and placing it upon record as notice of what is due. At all events, it appears to me to be of doubtful policy to encourage such securities. If the transaction is an honest one, let the parties place the truth upon the record. It is unnecessary to speculate how it may work mischief. It ought to be condemned, when it is ascertained that, instead of expressing the true, it gives a false consideration upon its face. Notwithstanding all the arguments I have seen advanced in support of such a mortgage, I would not give it my judicial sanction if the question were newly presented. But as I

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stated, the authorities are in favor of the validity of such mortgages, and they are such as I feel bound to follow.[31]

* * * * * * *

ORTON, J., IN SHORES v. DOHERTY, 65 Wis. 153 (1886):

The learned counsel of the respondent contends that the mortgage was given to secure $2,000 only of advances, and when such advances amounted to that sum and were paid the mortgage was satisfied. On the other hand, the learned counsel of the appellant contends that the bond and mortgage were intended to be a continuing security for all advances finally unpaid, to the amount of the penalty of the bond. * * * The condition of the mortgage is not only to pay $2,000, but according to the conditions of the bond. The conditions of the bond must therefore be consulted, to ascertain the limitations of the mortgage security. The condition of the bond is "to pay all the advances which may be made to them under this agreement at the times, in the manner, and with the interest agreed upon." This language is certainly explicit enough to make the mortgage a continuing security for all unpaid advances.

[31] In Bell v. Fleming's Exrs., 12 N. J. Eq. 11, Chancellor Williamson, in sustaining a similar mortgage, said: "Although the statute requires that the registry must contain the amount of the mortgage, and when payable, the registry is not intended as notice of the amount which is actually due upon the mortgage. A mortgage may be half paid a week after it is executed, and so only half the amount be due upon it as it stands upon the record. It may be a mortgage of long standing, with a large accumulation of interest upon it, so that the amount due upon it is very much larger than appears from the record. Neither the mortgagor nor the mortgagee is bound to keep the record accurate as to the amount due upon the mortgage. If it had been intended that the amount appearing upon the record should be conclusive between the parties, and if the object of recording the amount was that purchasers and creditors might rely upon the record as to the amount actually due between the parties, then the statute is very imperfect in its provisions for accomplishing such an object. But this was not the object. It was simply to give to parties interested such notice as would lead them to proper inquiries, and enable them to protect their interest." The decision was affirmed by the Court of Appeals, 12 N. J. Eq. 490.

See Hendon v. Morris, 110 Ala. 106; Tully v. Harloe, 35 Cal. 302; Collins v. Carlile, 13 Ill. 254; Johnson v. Bratton, 112 Mich. 319; Foster v. Reynolds, 38 Mo. 553; Bank of Utica v. Finch, 3 Barb. Ch. (N. Y.) 293; Hendricks v. Gore, 8 Ore. 406; Shiras v. Craig, 7 Cranch (U. S.) 34.

In Johnson v. Bratton, supra, Moore, J., says: "The general rule is that you can not import into a written agreement a parol agreement which alters the terms or legal effect of the written agreement. An exception to this rule, however, is made in relation to mortgages. * * * Though the mortgage, on its face, is for the payment of a specific sum of money, parol evidence is admissible to show that it was really intended to secure future advances."

In Rhines v. Baird, 41 Pa. St. 256, it was held that an absolute deed may be shown by parol to have been executed to secure a future advance and is valid for that purpose.

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The bond is like the penal official bond of an officer required to keep, pay over, and account for all moneys which come to his hands in whatever amount and at whatever times. Such moneys may be an hundred fold greater than the penalty of the bond, and when all has been paid or accounted for except an amount equal to or within the penalty of the bond, the sureties, even, are held liable on such bond for such deficit.

* * * * * * *

It is very clear that from the object and purpose of giving the bond and mortgage it was intended to be a continuing security for the last balance of advances on the contracts. The advancements were being paid by the delivery of the timber and logs from time to time, and others were being made to assist Hay & Stratton in completing their contract and paying their men. The security would have been very inadequate, and indeed of little use, if not continuous and to apply to any and all future advances after the preceding ones had been paid.[32]

ACKERMAN v. HUNSICKER.

COURT OF APPEALS OF NEW YORK, 1881.
85 N. Y. 43.

ANDREWS, J. The mortgage from Levi, to the plaintiff, was given to secure the mortgagee, for any indorsements he had made, or should thereafter make, for the mortgagor, or the firm of Levi & Miller, to the amount of $6,000. It was dated May 2, 1874, and was recorded May 3, 1874. The first indorsement was made May 7, 1874, and the last October 16, 1874. The plaintiff has been compelled to pay the indorsed paper, and has advanced for that purpose the sum of nearly $5,000, over and above all payments made by the mortgagor. This action is brought to foreclose the mortgage, and the only controversy relates to the priority of lien as between the mortgagee and judgment creditors of the mortgagor, whose judgments were obtained subsequent to the mortgage, but prior to the indorsement by the plaintiff, of some of the notes, which enter into and form a part of the mortgage debt.

The question is whether the mortgage is a paramount lien to the judgments, as to that part of the mortgage debt, arising out of indorsements made after the judgments were docketed. It is not claimed that the plaintiff had actual notice of the judgments when

[32] To the same effect, Lawrence v. Tucker, 23 How. (U. S.) 14; In re York, Fed. Cas. 18138; Courier-Journal Co. v. Schaeffer-Meyer Co., 101 Fed. 699; Hannum v. Wallace, 4 Humph. (Tenn.) 143. But see Truscott v. King, 6 N. Y. 147.

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he indorsed the paper, and it is found by the referee that he never had personal notice or knowledge, or any notice of their existence, until after all the indorsements had been made. The judgments were docketed in the county where the mortgaged premises were situated. If the docketing of the judgments was constructive notice to the plaintiff of their existence, then he had notice of the judgments; otherwise he had none.

There is no question as to the validity of mortgages to secure future advances or liabilities. They have become a recognized form of security. Their frequent use has grown out of the necessities of trade, and their convenience in the transactions of business. They enable parties to provide for continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security, on each new transaction. It is well known that such mortgages are constantly taken by banks, and bankers, as security for final balances, and banking facilities are extended and daily credits given, in reliance upon them. Mortgages for future advances have sometimes been regarded with jealousy, but their validity is now fully recognized and established. (Bank of Utica v. Finch, 3 Barb. Ch. 294; Truscott v. King, 6 N. Y. 147; Robinson v. Williams, 22 *id.* 380; Shirras v. Caig, 7 Cranch, 34; Lawrence v. Tucker, 23 How. [U. S.] 14; Leeds v. Cameron, 3 Sumn. 492.)

There can be no doubt, therefore, that the mortgage in this case, as between the parties to it, is a valid security for the plaintiff's debt. It is equally clear that to prefer an intervening incumbrance over the claim of the plaintiff, would violate the understanding of the parties to the mortgage, at the time it was executed, for the plain intention was, that the interest of the mortgagor in the land, as it existed when the mortgage was given, should be bound as security for all liabilities which the plaintiff might incur as indorser, upon the faith of the mortgage. It could not have been intended that the plaintiff should be deprived of any part of the security of the mortgage, for any part of the indorsed paper. It would have been a clear breach of good faith on the part of the mortgagor, if he had, without notice to the mortgagee, voluntarily incumbered the land by liens having priority of the mortgage, and then applied to the plaintiff for, and procured further indorsements.

If the judgments have a preference over the plaintiff's mortgage, as to indorsements made after the judgments were docketed, it must result from some superior equity of the judgment creditors, or from the effect of docketing the judgments, as constructive notice to the plaintiffs of their existence. The authorities are clear to the point, that upon general principles of equity, no such preference can be claimed. In Gordon v. Graham (2 Eq. Cas. Abr.

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598) Lord Chancellor Cowper is reported to have held that a first mortgagee, in a mortgage covering future advances, has priority not only for what may be due to him at the time of a second mortgage, but also for advances made by him after notice of the second mortgage. This case was doubted in England, as to the point reported to have been decided, that the first mortgagee was entitled to a preference for advances made after notice of the second mortgage, and in Hopkinson v. Rolt (9 H. L. Cas. 514) this doctrine was overruled;[33] but the court distinctly recognized and affirmed the doctrine, that the first mortgagee was protected as to advances made after the second mortgage without notice. The case of Shirras v. Caig (7 Cranch, 34), is a leading case in this country upon this point. The mortgage in that case was executed to secure existing debts and future advances. The mortgagors subsequently conveyed the equity of redemption to the defendants, who were bona fide purchasers without notice of the plaintiffs' mortgage, and one of the questions was, whether the mortgagees who had made advances to the mortgagors on the faith of the mortgage, after they had conveyed to the defendants, but without notice of their title, could enforce the mortgage for such advances, and it was held that they could, Marshall, Ch. J., saying, that the mortgage stood as security for "the payment of debts still remaining due to them, which were either due at the date of the mortgage or were afterward contracted upon its faith, either by advances actually made, or incurred, prior to the receipt of actual notice of the subsequent title of the defendants." The effect of the registry laws was not involved, and the case was decided upon the general equities. The advances in Shirras v. Caig were optional; that is, the mortgagees were not bound to make them; and the same is true of the advances in Gordon v. Graham. Shirras v. Caig has been frequently cited with approval by the courts in this state, and its authority, so far as I know, has not been questioned. (Brinkerhoff v. Marwin, 5 Johns. Ch. 320; Griffin v. Burnett, 4 Edw. Ch. 673; Truscott v. King, supra; Robinson v. Williams, 22 N. Y. 380.) It must, I think, be conceded that, according to general principles of equity, the lien of the plaintiff's mortgage is superior to the lien

[33] "In this country there has been some leaning toward the early English rule. See Witczinski v. Everman, 51 Miss. 841; 1 Jones Mortg., § 373; 3 Pom. Eq. Jur., § 1199; Rowan v. Sharps' Rifle Mfg. Co., 29 Conn. 282; Brinkmeyer v. Helbling, 57 Ind. 435; Brinkmeyer v. Browneller, 55 Ind. 487; Wilson v. Russell, 13 Md. 494. But the stronger array of authority is found on the side of the doctrine established by the House of Lords in the Hopkinson case. See Frye v. Bank, 11 Ill. 381; 1 Jones Mortg., §§ 368, 369; 3 Pom. Eq. Jur., § 1199, and cases in note 1, p. 180." Corliss, C. J., in Union Nat. Bk. v. Moline, Milburn & Stoddard Co., 7 N. Dak. 201, 208.

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of the judgments, as well for indorsements made prior to their rendition, as for those subsequently made without notice.

It remains to consider whether, under the statutory system for the registry of liens, the docketing of the judgments was constructive notice to the plaintiff. If the docketing of the judgments was constructive notice to him, of their existence, then, unquestionably, the judgments have preference to the plaintiff's mortgage as to all advances subsequently made.

The general principle of construction of the registry laws upon the point of notice, is that the registration of incumbrances is notice to subsequent incumbrancers only. They are prospective, and not retrospective, in their operation. (Stuyvesant v. Hall, 2 Barb. Ch. 151; King v. McVickar, 3 Sandf. Ch. 192; Howard Ins. Co. v. Halsey, 8 N. Y. 271.) The plaintiff's mortgage was first made, and first recorded, and regarding these facts only, the mortgage was the prior lien. It is claimed, however, that the mortgage did not become an actual lien or incumbrance until the indorsements were made, and that as to each indorsement it became in effect a new mortgage, as of the time when such indorsement was made, and that as to indorsements made subsequent to the docketing of the judgments, the mortgage must be deemed a subsequent lien. It is manifestly true that the mortgage did not become an actual charge on the land, so as to be enforceable by the plaintiff, until he had incurred liability as indorser. But the plaintiff's mortgage was an instrument capable of being recorded under the statute, before any liability had been incurred. It is the general practice to record mortgaged, and docketed judgments, taken to secure future advances and contemplated liabilities, before an actual indebtedness arises. On being recorded, the record is notice to subsequent purchasers and incumbrancers, and they are put upon inquiry and have the means of ascertaining to what extent advances have been made, and by notice, to prevent further advances to their prejudice. In Truscott v. King (6 N. Y. 147), judgment had been entered on a bond and warrant of attorney for $20,000, to secure existing and future liabilities, and Jewett, J., said there could be no doubt that the judgment in its inception was a valid security upon the land to the full amount, whether a debt only in whole or part then existed, if it was agreed at the time that it should be given as an indemnity for advances thereafter to be made, or such advances were thereafter made. In Robinson v. Williams (22 N. Y. 386), a mortgage had been executed to secure future liabilities of the mortgagor to the Hollister Bank, on paper which might be discounted by the bank for the mortgagor. The mortgage was recorded on the day it was executed, and before any liabilities had been incurred. Davies, J., in giving the opinion of the court, said: "The recording of the

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mortgage was notice that the Hollister Bank had a mortgage on the premises for the purpose therein specified." It does not, I think, aid the argument for the judgment creditors, that the plaintiff had no claim on the land for the indorsements in question, until after the docketing of the judgments, or that by our law a mortgage is a mere lien or security, and not a title. The mortgage when executed was a conveyance within the recording act, and the plaintiff was entitled to put it upon record. It was a potential lien for its full amount, of which subsequent purchasers or incumbrancers had notice. They were informed by the record of the existence of a bond containing the condition upon which the mortgage was given, and through that of the agreement between the parties, that the interest of the mortgagor in the land, as it existed at the date of the mortgage, was pledged for any indorsements which the plaintiff might make, up to the limit fixed; for this, as we have said, was the plain reading of the transaction. It would be inequitable to permit third persons to deal with the mortgagee in respect to the land, to the prejudice of the plaintiff's security, without notice to him, or to allow a subsequent purchaser or incumbrancer, having notice by the record, to acquire a preference over the mortgage, for indorsements made upon the faith of the mortgage, after the second incumbrance, in ignorance of the intervening lien or title.

The question presented in this case has not been decided in this state by the court of last resort. In Brinkerhoff v. Marvin (5 Johns. Ch. 320), the chancellor, after referring to the observation of the court in Livingston v. McInlay (16 Johns. 165), that if it was a part of the original agreement, a judgment might be entered as a security for future advances beyond the amount then actually due, in like manner as a mortgage may be held as a security for future advances, said: "The limitation to this doctrine I should think would be, that when a subsequent judgment or mortgage intervened, further advances after that period could not be covered." The remark of the chancellor has been repeated in subsequent cases. (Lansing, Rec'r. v. Woodworth, 1 Sandf. Ch. 43; Barry v. Mer. Ex. Co., *id.* 280; Goodhue v. Berrien, 2 *id.* 630.) What was said by the chancellor in Brinkerhoff v. Marvin was unnecessary to the decision of the case, but with the qualification that the first incumbrancer had notice of the intervening right when the subsequent advances were made, the observation is not open to controversy. Neither in that, nor any of the subsequent cases referred to, was it material to decide, whether the record of the subsequent incumbrance, was notice to the party holding the prior lien, and in none of them was this question considered. In Craig v. Tappin (2 Sandf. Ch. 78), it does not appear whether the first mortgagee had notice of the second mortgage when the subsequent advances

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were made. He knew that the second mortgage was to be given, and the inference that he knew of its existence when the advances were made, is not an unreasonable one. In Truscott v. King (6 Barb. 346) the Supreme Court expressly decided the point involved in this case in accordance with the view I have expressed. The judgment of the General Term was reversed in this court on another point, but one of the judges who wrote an opinion for reversal, expressed his concurrence in the views expressed by Judge Parker in the court below, upon the point now in controversy. (See opinion of Edwards, J., 6 N. Y. 166.) The adjudications in the courts of other states upon the question are conflicting. It would not be profitable to refer to them at length. They will be found cited in Jones on Mortgages, § 364 et seq.

The doctrine that a party who takes a mortgage to secure further optional advances, upon recording his mortgage is protected against intervening liens, for advances made upon the faith and within the limits of the security, until he has notice of such intervening lien, and that the recording of the subsequent lien is not constructive notice to him, has, we think, been generally accepted as the law of the state, at least since the decision in Truscott v. King. It would not be wise, under the circumstances, now to adopt the opposite view, even though we should regard it as better supported by reason. It seems to us, however, that the doctrine which we have affirmed in this case is most consistent with equity, and establishes a rule which is reasonable, and easy of application. The opposite rule imposes the burden of notice and vigilance upon the wrong person. The party taking the subsequent security may protect himself by notice, and as is said by Mr. Jarman in his notes to Bytherwood's Conveyancing: "No person ought to accept a security subject to a mortgage authorizing future advances, without treating it as an actual advancement to that extent."

These views lead to a reversal of the order of the General Term and an affirmance of the judgment entered upon the report of the referee.

All concur.

Order reversed and judgment affirmed.[34]

[34] See Tapia v. Demartini, 77 Cal. 383; Schmidt v. Zahrndt, 148 Ind. 447; Nelson v. Boyce, 7 J. J. Marshall (Ky.) 401; Ward v. Cook, 17 N. J. Eq. 93; Union Nat. Bk. v. Moline &c. Co., 7 N. Dak. 201; McDaniels v. Colvin, 16 Vt. 300; Wilson v. Russel, 13 Md. 494; Witczinski v. Everman, 51 Miss. 841.

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LADUE v. DETROIT & MILWAUKEE R. R. CO.

SUPREME COURT OF MICHIGAN, 1865.
13 Mich. 380.

CHRISTIANCY, J.: The mortgage which the bill in this case seeks to foreclose, was executed by John Ladue to the complainant and Francis E. Eldred, composing the firm of Ladue & Eldred, on the fourth day of August, 1852, to secure and indemnify the firm against any indorsements which might be made, or liabilities to be incurred by them as sureties for John Ladue, as well as for any moneys they might advance for him, according to the condition of a bond to which the mortgage was collateral, and which was of like effect. There was nothing in the papers or in the arrangement between parties which bound Ladue & Eldred to make any advances, or indorse any paper for John Ladue, or to incur any liability for him, nor was the latter bound to accept any such accomodation. The effect of the arrangement was that such advances and liabilities, if made or incurred, would be purely optional on the part of the mortgagees. This mortgage was duly recorded on the day of its date. On the ninth day of May, 1853, John Ladue, the mortgagor, sold and conveyed the mortgaged premises to Charles Howard (through whom the railroad company derive their title), by warranty deed, which was duly recorded on the ninth day of July, 1853. John Ladue, however, remained in possession, using the premises as before, until his death, December 4, 1854.

No claim is made for any advances made by Ladue & Eldred to John Ladue, but the whole claim under the mortgage is based upon indorsements made for him by the mortgagees, which have been paid by Andrew Ladue, one of the complainants, and all these indorsements, as shown by the proofs, were made some time after the sale to Howard and the recording of his deed. Whatever indorsements were made prior to that time, seem to have been taken up by John Ladue; and it does not satisfactorily appear by the evidence that any of these indorsements, made since the recording of Howard's deed, were made in renewal of paper indorsed by them previous to that time. No indorsements made prior to the recording of Howard's deed are in any way involved, and the case may, therefore, be considered in all respects in the same light as if no such previous indorsements had ever been made, especially as it does not appear that at the time of the sale to Howard, or the recording of his deed, there was any existing unsatisfied indorsement, or any subsisting liability, inchoate or otherwise, incurred by the mortgagees for the mortgagor.

The mortgagees, at the time of the indorsements in question, had

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no notice of the deed to Howard, unless the record of that deed is to be considered such notice, the deed having been some months previously recorded. The validity of the mortgage, as between the parties, for any amount of advances which might be made, or liabilities incurred under it, after they should have been thus made or incurred, is not questioned by the defendants; nor is it denied that the record of it would be sufficient notice to subsequent purchasers and incumbrancers, of the amount which the mortgagees might actually have advanced or indorsed for the mortgagor; or, in other words, the amount for which it had become an actual or subsisting security, at the time when the question of notice of the mortgage became material—which, for the purposes of this case, is admitted to cover the period from the purchase by Howard down to the time of the recording of his deed, the record of which is claimed to be notice to the mortgagees as regards any advances made to, or liabilities incurred by them for the mortgagor after the recording of the deed. Nor is it denied, that if the mortgagees, by the contracts or arrangements between them and the mortgagor (to secure which, on the part of the latter, was the object of the mortgage), had been bound to make advances or to indorse for the mortgagor, the record of the mortgage would have been full notice to Howard, and the mortgage would have been good against him, though the advances were not in fact made or the paper indorsed until after the deed to him and actual notice of that deed to the mortgagees. The defendants also admit that the result would be the same under this mortgage, as to any advances made or paper indorsed by the mortgagees for the mortgagor, before they had actual or constructive notice of the sale and deed to Howard; but they insist that, as there was not at the time of Howard's purchase or the recording of his deed any debt of the mortgagor, or any liability incurred for him by the mortgagees, absolute or inchoate, nor any obligation on their part to incur such liability, the mortgage was not then an incumbrance in fact or in legal effect; that it could only become such from the time when the advances or indorsements were actually made; and it being optional with the mortgagees whether they would make any such advances or indorsements; and the indorsements being made subsequent to the recording of Howard's deed, the mortgage is, in legal effect, subsequent to the deed, and the record of the deed was notice to the mortgagees of Howard's rights.

The first question, therefore, for our determination is, what was the legal effect of the mortgage (if any) upon the land, at the time of the recording of the mortgagor's deed to Howard?

That a mortgage in this state, both at law and in equity, even when given to secure a debt actually subsisting at its date, conveys no title of the land to the mortgagee (especially since the

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statute of 1843, taking away ejectment by the mortgagee); that the title remains in the mortgagor until foreclosure and sale, and that the mortgage is but a security, in the nature of a specific lien, for the debt has been already settled by the decisions of this court: Dougherty v. Randall, 3 Mich., 581; Caruthers v. Humphrey, 12 Mich., 270; and Crippen v. Morrison, to be reported in 13 Mich. This is in accordance with the well settled law of the state of New York, from which our system of law in regard to mortgages has been, in a great measure, derived: Jackson v. Willard et al., 4 Johns., 41; Collins v. Torrey, 7 Johns., 278; Runyan v. Mersereau, 11 Johns., 534; Gardner v. Heart, 3 Denio, 232; Edwards v. Ins. Co., 21 Wend., 467; Waring v. Smyth, 2 Barb. Ch., 119; Bryan v. Butts, 27 Barb., 504; The Syracuse City Bank v. Tallman, 31 Barb., 201; Cortwright v. Cady, 21 N. Y., 343.

This view of a mortgage is also sustained by several of the English decisions, and substantially this is the more generally received American doctrine, as will sufficiently appear by reference to the decisions, most of which have been carefully collected in the elaborate brief of the defendant's counsel, but which are too numerous to be cited here. There are exceptions and peculiarities in particular states in some of which, as in some of the New England states and Kentucky, the old idea of an estate upon a condition continues to rankle in the law of mortgages, like a foreign substance in the living organism, but is rapidly being eliminated and thrown off by the healthy action of the courts under a more vigorous application of plain common sense. But few of the incidents of this antiquated doctrine are now recognized in most of the states of this Union. The title, for nearly all practical purposes, being now recognized, both at law and in equity, as continuing in the mortgagor, and the mortgage as a mere lien for the security of the debt. But wherever any vestige of this now nearly exploded idea continues to prevail, in connection with the more liberal doctrines of modern times which the courts have been compelled, from time to time to adopt, it serves only to confuse and deform the law of mortgages by various anomalies and inconsistencies, making it a chaos of arbitrary and discordant rules resting upon no broad or just principle; while, by recognizing the mortgage as a mere lien for the security of the debt, at law as well as in equity, and thus giving it effect according to the real understanding and intention of the parties, the law of mortgages becomes at once a syster of homogeneous principles, easily understood and applied, and just in their operation.

A mortgage, then, being a mere security for the debt or liability secured by it, it necessarily results, 1st, That the debt or liability secured is the principal, and the mortgage but an incident or accessory. See cases above cited; also Richards v. Synes, Barnadis-

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ton's Ch. R., 90; Roath v. Smith, 5 Conn., 133; Lucas v. Harris, 20 Ill., 165; Vansant v. Allmon, 23 Ill. 30; Ord v. McKee, 5 Cal., 515; Ellison v. Daniels, 11 N. H., 274; Hughes v. Edwards, 9 Wheat., 489; Green v. Hart, 1 Johns., 580; McGan v. Marshall, 7 Humph., 121; 4 Kent's Com., 193; McMillan v. Richards, 9 Cal. 365.

2nd. That anything which transfers the debt (though by parol or mere delivery), transfers the mortgage with it, see cases above cited, especially Vansant v. Allmon, 23 Ill., 30; Ord v. McKee, 5 Cal., 515; Ellison v. Daniels, 11 N. H. 274. See also, Martin v. Mowlin, 2 Burr., 978; Clark v. Beach, 6 Conn., 164; Southern v. Mendurn, 5 N. H., 420; Wilson v. Kimball, 27 *id.*, 300; 36 N. H., 39; Crowl v. Vance, 4 Iowa, 434; 1 Blackf., 137; 5 Cow., 202; 9 Wend., 410; 1 Johns., 580.

3rd. That an assignment of the mortgage without the debt is a mere nullity. Ellison v. Daniels, 11 N. H. 274; Jackson v. Bronson, 19 Johns. 325; Wilson v. Throop, 2 Cow. 195; Weeks v. Eaton, 15 N. H. 145; Peters v. Jamestown Bridge Co., 5 Cal. 334; Webb v. Flanders, 32 Me. 175; Kent's Com., ubi supra; Thayer et al. v. Campbell et al., 9 Mo. 277.

4th. That payment, release, or anything which extinguishes the debt, ipso facto extinguishes the mortgage: Lane v. Shears, 1 Wend. 433; Sherman v. Sherman, 3 Ind. 337; Ryan v. Dunlap, 17 Ill. 40; Armitage v. Wickliffe, 12 B. Mon. 496; Paxton v. Paul, 3 Harris & Mc. H. 399; Perkins v. Dibble, 10 Ohio 434; Breckenridge v. Ormsby, 1 J. J. Marsh. 257; Cameron v. Irwin, 5 Hill 272. (It will be seen from these authorities, that some, if not all, of these incidents or characteristics of a mortgage are recognized by some of the courts which still hold the mortgage to be a conveyance of the estate—an idea, however, with which they are utterly inconsistent, as such incidents can only logically flow from the doctrine that the estate still remains in the mortgagor, and that the mortgage is but a lien for security of a debt.)

These propositions, being established, the necessary result is that the mortgage instrument, without any debt, liability or obligation secured by it, can have no present legal effect as a mortgage or incumbrance upon the land. It is but a shadow without a substance, an incident without a principal; and it can make no difference in the result whether there has once been a debt or liability which has been satisfied, or whether the debt or liability to be secured has not yet been created, and it requires, as in this case, some future agreement of the parties to give it existence. At most, the difference is only between the nonentity which follows annihilation, and that which precedes existence.

The instrument can only take effect as a mortgage or incumbrance from the time when some debt or liability shall be created, or some

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binding contract is made which is to be secured by it. Until this takes place, neither the land nor the parties, nor third persons, are bound by it. It constitutes, of itself, no binding contract. Either party may disregard or repudiate it at his pleasure. It is but a part of an arrangement, merely contemplated as probable, and which can only be rendered effectual by the future consent and further acts of the parties. It is but a kind of conditional proposition, neither binding, nor intended to bind, either of the parties, till subsequently assented to or adopted by both.

Though the question does not properly arise here, we take it for granted, for the purposes of this case, that the mortgage instrument may, if properly executed, go upon the record, and become effectual between the parties when the debt or liability contemplated shall have been created, unless the mortgagor has, in the meantime—as he had a clear right to do—parted with the title and deprived himself of the power of creating an incumbrance upon it. But the mere recording of the instrument would not make it a mortgage or incumbrance in legal effect, if it were not so before, nor give it a greater effect, as to third persons than it had between the parties. The record of such an instrument might be an intimation that advances and indorsements were contemplated as probable, and that they might, therefore, have been already made; and for this reason might, to this extent properly put a purchaser or incumbrancer upon inquiry. But, unless it is to have a greater effect than the record of other mortgages, it could be notice only of such facts as might have been ascertained by inspection of the instrument and papers referred to, and by inquiry; in other words, by a knowledge of the rights of the parties in respect to the land at the time notice became material, which, for the purposes of this case, as already explained, we shall assume to be from the time of Howard's purchase down to the time when he recorded his deed. The result must, therefore, be the same here as if there had been no record. Had Howard made the most diligent inquiry in connection with the inspection of the papers, what facts could he have ascertained? Nothing material to the rights of the parties or to his own rights beyond the facts already stated—nothing which, in any manner, interfered with the mortgagor's absolute right of sale. He would have learned, in fact, that the instrument recorded as a mortgage was not, in legal effect, a mortgage, nor upon any principle of justice or equity an incumbrance upon the land; that either party had a perfect right to refuse to give that future assent or to enter into that future contract or arrangement, by which alone it could acquire validity or force. He had, therefore, a just right to conclude that the record of his deed would be fair notice to the persons mentioned as mortgagees, as the instrument could only become a mortgage subsequent to that time, and then only by reason of some future debt or liability which it required

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the further assent and agreement of the parties to create. He had a right to conclude that, upon every sound principle, Ladue and Eldred would, as prudent men, be as likely, and ought to be as much bound, to look to the record before making any such advances, or indorsing paper for the mortgagor, as if a new mortgage for the purpose were to be taken at the time, since they had the same option to make the advances or not, as any new mortgagee would have had and ought, therefore, to be governed by the same prudential considerations. And they must be presumed to have known that John Ladue, until such advances or indorsements were made by them, had full power to sell the land free from any incumbrance of the mortgage instrument, which had not as yet become a mortgage.

But it is urged on the part of the complainant, that it was the duty of Howard, on making the purchase, to give actual notice of the fact to the mortgagees, so that they might not afterwards be led to incur further liabilities on the faith of the mortgage. In England, where there is no general registry law by which the record of deeds and mortgages is made notice to all the world, and the state of the title can not therefore be always ascertained in this way as with us, and where parties, therefore, can only rely upon actual notice, there may be good reason for requiring actual notice in such a case. But upon no principle which I have been able to comprehend, do I think such actual notice should be required in a case like the present. Nor have I been able to see any just or substantial reason why the record of Howard's deed (which was long before this mortgage instrument took effect as an incumbrance, and therefore prior in fact and law) should not be deemed notice to the mortgagees in the same manner, and to the same extent, as if their mortgage had not been executed or recorded until the time when it became effectual as a mortgage by their indorsements. Within the very spirit and purpose of the registry law, it seems to me, the record of the deed must be held notice in the one case as well as in the other. The opposite view, it seems to me, rests upon the erroneous idea that the recording of a mortgage adds something to its validity as between the parties, and that, even as between them, an instrument may be made a mortgage by recording it, which would not have that operation without the record. This certainly is not the effect of our registry laws. If Howard could not rely upon the record of his deed for giving notice to these mortgagees, as to future advances or indorsements, without which their mortgage instrument could never become effectual, even as between the parties, then it is difficult to see why he should be allowed to rely upon it as against any person who he might know had contemplated purchasing or taking a mortgage upon the property, and whose efforts or conversations had gone so far as to render it probable to the mind of such person that his preliminary negotiations or conversations might, at some future period, have resulted in a pur-

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chase or a mortgage; though at the time of the record of Howard's deed they had not resulted in any binding contract whatever, and both parties were at liberty to disregard them, without any breach of faith. As to all such persons, it has, I think, been generally conceded that the record of a deed is sufficient notice. In Craig v. Tappan (2 Sandf. Ch. 78), a case cited by complainant's counsel, it was held that notice that a mortgage was about to be made, is not enough to bind a party with notice of the mortgage. And see Cushing v. Hurd, 4 Pick. 253; Warden v. Adams, 15 Mass. 232.

I have thus far endeavored to show that upon principles resulting from the nature of a mortgage, as recognized here, this mortgage should be considered, in fact and in legal effect, subsequent to the deed, and that the registry of the deed should, therefore, be considered notice to the mortgagees. The authorities upon this question are not so numerous as one would be led to expect; but the few which are to be found are conflicting. I shall first notice those which are claimed to be opposed to the conclusion at which I have arrived. The English authorities upon this question I consider of very little, if any, weight, for the reason already stated, and for the further reason that, for several purposes a mortgage is there still held to be a conveyance of the estate upon condition, and the mortgagee as having the legal title—a doctrine upon which the right of tacking (never recognized in this state) to some extent depends; the legal title coupled with an equity being held to prevail over an equity: 4 Kent's Com., 117; Coote on Mortg., 410, et seq.; Opinion of Lord Cranworth in Hopkinson v. Ralt, 7 Jurist, N. S., 1209. The latter remark applies also with equal force to the decisions cited from Kentucky: Nelson's Heirs v. Boyce, 7 J. J. Marshall, 401, goes upon the express ground that the mortgage conveys the legal title, and that the mortgagee, therefore, is not bound to notice the record of a mortgage subsequently made by the mortgagor, who has only the equity of redemption. It cites Bank, etc., v. Vance, 4 Littell, 173, as supporting the doctrine of tacking upon this ground. Nelson v. Boyce also assigns, as another reason, why the record should not be notice, a provision of their statute allowing sixty days in which to record a mortgage, and says, an examination of the record by the first mortgagee might therefore be of no use. Now, it is clear that neither of these reasons for refusing to the record the effect of notice exists here. Of the case of Burdett v. Clay, 8 B. Monroe, 287 (besides the fact that the mortgagee there holds the legal estate), it may further be noticed that, though the previously recorded mortgage was in part to secure future liabilities, yet all the liabilities were incurred before the subsequent mortgage. There are some few cases in this country, decided mainly, if not solely, upon the authority of Gordon v. Graham (7 Viner's Abr., p. 52, 2 Eq. Cases Abridged, 598), which can have little influence here, not only for

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the reason above stated, but because the case itself is no longer law even in England. This case decided that a mortgagee to secure money lent, and future advances (which he was not bound to make), was entitled to preference over a subsequent mortgagee, even for advances made after notice of the second mortgage. But so far as relates to advances made after such notice, this case was expressly overruled by the house of lords in Hopkinson v. Ralt, 7 Jurist, N. S., 1209; Law Time, N. S., 90.

Most of the cases cited by complainant's counsel against the proposition I have endeavored to establish, have no bearing upon the particular question we are now discussing.

* * * * * * *

Having examined the cases relied upon by the complainant's counsel, as tending to controvert the conclusions at which I have arrived, I will now refer to those of an opposite tendency, some of which expressly hold the record to be notice of the intervening conveyance or incumbrance.

In Collins v. Carlisle, 13 Ill. 254, there was a mortgage to secure future advances, and a contract subsequent in date and time of record for the sale of the land by the mortgagor, both recorded. It was held, the mortgage was valid, for those advances only which were made prior to the recording of the contract. The principle is not discussed, but it seems to be taken for granted that the record of the contract was notice as to advances afterward made.

In Kramer v. Farmers and Mechanics' Bank, 15 Ohio, 253, it was held that a mortgage to indemnify against indorsements to be made for the mortgagor is valid and constitutes a lien, which takes precedence of the lien of a judgment rendered after such indorsements have been made. But, it is said, the lien of a judgment would probably be preferred to the lien of the mortgage for advances made subsequent to the recovery of the judgment. The liability of the mortgagee had attached before the subsequent judgment, and, therefore, the point was not involved. But in the subsequent case of Spader v. Lawler, 17 Ohio, 371, which was also the case of a mortgage to secure future advances, it was held, that the mortgage must be postponed to a mortgage subsequently recorded, but before the future advances were made, thus directly holding the record notice as to advances thereafter made under the first recorded mortgage; in other words, treating the first as a subsequent mortgage in reference to advances made after the record of the second. It is true that one of the grounds upon which the decision seems to be placed, is that the record of the mortgage (for the advances) ought to give notice of the amount of the incumbrance.

The first case, so far as I have been able to discover, which fully meets and discusses the question upon principle, is that of Terhoven v. Kerns, 2 Barr, 96. It was the case of a judgment to secure fu-

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ture advances, which were optional; and it was held that such judgment, as to advances made after the rendition of a subsequent judgment was not a lien as against the latter. The judgments are treated by the court as standing upon the same grounds as mortgages, and the question is discussed generally. It is held that a mortgage to secure future advances, which are optional, does not take effect between the parties as a mortgage or incumbrance until some advance has been made—that, if not made until after another mortgage or incumbrance has been recorded, it is, in fact, as to such after advances, a subsequent and not a prior incumbrance; and that the record of the subsequently recorded mortgage is notice as to such after advances, as much as if the mortgage first recorded had not been executed until after such advances were made. The doctrines of this case were fully as strongly re-affirmed in Bank of Montgomery's Appeal, 36 Penn., 170. (See, also, Parmenter v. Gillespie, 9 Barr, 86, and note "a," as to distinction between cases when the mortgagee is bound to make the advances, and when they are optional.) The doctrine of these cases is pronounced reasonable by Sanford, judge, delivering the opinion of the court in Boswell v. Goodwin, 31 Conn., 74, and he pointedly asks why such mortgage should not be treated "in all respects as if executed at the time when the advances are made." But one of the judges dissented as to this point, and the case was decided upon other grounds.

Judge Redfield, late chief justice of Vermont, ably discusses this question in a note to the case of Boswell v. Goodwin, Amer. Law Reg., vol. 12, p. 92, arriving substantially at the same conclusion as that at which I have arrived. And Mr. Washburn (in 1 Wash. on Real Property, p. 542), says it seems now to be the general rule.

The counsel for the complainant have strongly urged the inconvenience which must result, especially to banks and bankers (who are accustomed to take such mortgages), by requiring an examination of the record every time they are called upon to make such advances under such a mortgage. Like Judge Redfield (in the note above cited), I have not "been able to comprehend" this hardship. It is, at most, but the same inconvenience to which all other parties are compelled to submit when they lend money on the security of real estate—the trouble of looking to the value of the security. But, in truth, the inconvenience is very slight. Under any rule of decision they would be compelled to look to the record title when the mortgage is originally taken. At the next advance they have only to look back to this period, and for any future advance only back to the last; which would generally be but the work of a few minutes, and much less inconvenience than they have to submit to in their ordinary daily business in making inquiries as to the responsibility, the signatures and identity of the parties to commercial paper. But if there be any hardship, it is one which they can readily overcome,

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by agreeing to make the advances; in other words, by entering into some contract, for the performance of which, by the other party, the mortgage may operate as a security. They can hardly be heard to complain of it as a hardship that the courts refuse to give them the benefits of a contract which, from prudential or other considerations, they were unwilling to make, and did not make until after the rights of other parties have intervened. Courts can give effect only to the contracts the parties have made, and from the time they took effect.

The decree must be reversed, and the bill dismissed; and the appellants must recover their costs in both courts.[35]

Martin, Ch. J., and Cooley, J., concurred.

Campbell, J., did not sit in this case.

BRINKMEYER v. BROWNELLER.

SUPREME COURT OF INDIANA, 1876.
55 Ind. 487.

WORDEN, C. J.: * * * On December 29th, 1868, Emanuel Grayville, Frederick Browneller and Anton Helbling, who then owned the property as partners, executed a mortgage on certain real and personal property, to the appellant, Brinkmeyer. The condition of the mortgage is as follows, the mortgagors being named as the parties of the first part, and Brinkmeyer as the party of the second part, viz.:

"The conditions of this mortgage are such, that whereas the said party of the second part is bound and liable, as the endorser and surety of the said Anton Helbling, on a certain promissory note executed by Helbling, on the 15th day of September, 1866, due twelve months after date, and made payable to the order of Maria Brinkmeyer, for the sum of twenty-four hundred dollars, ($2,400) with ten per cent. interest from date thereof; and whereas the party of the second part is also endorser and surety for the said Anton Helbling, on a certain note, executed to Archer & Co., of the city of Evansville, which note will mature on the 2d day of January, 1869, for the sum of seven hundred and twenty dollars ($720); and whereas the firm of A. Helbling & Co., composed of the said Anton Helbling, F. Browneller and E. K. Grayville, desire the said party of the second part to endorse and become liable upon their paper, notes, bills and acceptances to bank, and individuals, to an amount not to exceed eight thousand dollars ($8,000); and whereas the said Anton Helbling desires the said party of the second part to endorse and become liable upon his paper, notes, bills and acceptances to banks and individuals, for an amount not to exceed four thousand dollars

[35] See also Nicklin v. Betts Spring Co., 11 Ore. 406.

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($4,000); and the said party of the second part having agreed to become the endorser for said A. Helbling & Co., and the said Anton Helbling, upon their paper, notes, bills and acceptances, for sums of money not to exceed the amounts aforesaid; and whereas it may be necessary for the said party of the second part to become the endorser and surety of the aforesaid parties of the first part, in the renewal of their paper, notes, bills and acceptances aforesaid:

"Now, the purpose of this mortgage is to secure, save harmless and indemnify the said Brinkmeyer, the party of the second part, against all loss and damage, as the surety and endorser of said Anton Helbling, upon the note of Maria Brinkmeyer, for twenty-four hundred dollars, as aforesaid; and, also, to secure, save harmless and indemnify the said Brinkmeyer, the party of the second part, against all loss and damage as endorser and surety upon the paper, notes, bills and acceptances of the said A. Helbling & Co., and upon all renewals of any such notes, bills and acceptances, to either banks or individuals, to an amount not to exceed eight thousand dollars, as aforesaid; and, also, to secure, save harmless and indemnify the said party of the second part against all loss or damage, as the endorser and surety upon notes, bills and acceptances of the said Anton Helbling, and all renewals of the same to banks or individuals, to an amount not to exceed four thousand dollars, as aforesaid. And for the better securing of the party of the second part, against all loss, the said parties of the first part bind themselves to keep all the property herein specified, which may be liable to be destroyed by fire, fully insured in good and solvent insurance companies, and this is made an express condition of this mortgage; and it is further agreed, that said parties of the first part have possession of all said property, and continue to carry on the foundry business, in manufacturing and selling; and, on the happening of any one of the following contingencies, the said Brinkmeyer, the party of the second part, may, at his option, institute legal proceedings, to foreclose this mortgage,—or, without legal proceedings, may enter in and take possession of so much of said mortgaged personal property as he may consider necessary to indemnify and save himself harmless, as endorser and surety upon the notes, bills and acceptances of either the said A. Helbling & Co., or the said Anton Helbling, or both, which the said party of the second part has, or may hereafter, become liable for; that is to say, in case any of the notes, bills or acceptances on which the said party of the second part is now, or may hereafter become liable, are not paid or renewed at maturity, or, in case the said parties of the first part shall fail to keep said property insured as aforesaid, then a right of action, or a right to take possession, immediately shall accrue to the said party of the second part. Now, it is further agreed that, in the event of a foreclosure of this

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mortgage, the said parties of the first part shall pay all costs and expenses of such foreclosure."

* * * * * * *

Afterwards, Helbling conveyed his interest in the mortgaged premises, to Grayville and Browneller, of which Brinkmeyer had notice. After this, Brinkmeyer, in pursuance of the original agreement, and upon the demand of Helbling, endorsed for the latter to the amount of four thousand dollars, the most of which he has been compelled to pay, and the residue of which is still outstanding.

The question arising is, whether Brinkmeyer has a lien upon the mortgaged premises, by virtue of the mortgage, as an indemnity against loss and liability incurred by endorsing for Helbling, after the latter had transferred his interest in the mortgaged premises to Grayville and Browneller.

We shall not enter upon any lengthy discussion of the general doctrine applicable to mortgages given to secure future advances. The following propositions, however, we think, are settled by the authorities:

First. Where the mortgagee has bound himself to make advances or incur liabilities, such advances, when made, shall relate back, and the mortgage will be a valid lien for advances made or liabilities incurred, against subsequent purchasers or encumbrancers with notice, actual or constructive, of the mortgage.

Second. Where there is no obligation on the mortgagee, and such advances or liabilities are merely optional with him, and he has actual notice of a subsequent encumbrance or conveyance of the mortgaged premises, before making advances or incurring liabilities, his lien is not good, as against the subsequent purchaser or encumbrancer. See 11 Am. Law Reg., N. S., 273, and authorities there cited.

The case of Ladue v. The Detroit &c. R. R. Co., 13 Mich. 380, is an exhaustive one, in which the authorities are extensively examined, both by the counsel and the court. Chancellor Kent (4 Kent Com. 175) says:

"So, a mortgage or judgment may be taken, and held as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement; and the future advances will be covered by the lien, in preference to the claim under a junior intervening incumbrance, with notice of the agreement."

But the appellees insist that there was no valid consideration for Brinkmeyer's agreement to endorse for Helbling, and that it was entirely optional with him to do so or not, and, therefore, that the case falls within the second proposition above stated. The case must turn upon this question.

We think, however, there was an ample and valid consideration for Brinkmeyer's promise, appearing on the face of the transaction,

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which was the indemnity he acquired by the mortgage, against his liability on the note to Maria Brinkmeyer and the note to Archer & Co. Brinkmeyer, by his promise to endorse, in the future, for the firm of A. Helbling & Co., and for A. Helbling, as stipulated for, obtained an indemnity against an existing liability, which he did not otherwise possess. By the mortgage, he obtained, not only "security for the future," but, "indemnity for the past." Without the mortgage, if Brinkmeyer, had been compelled to pay the notes to Maria Brinkmeyer and Archer & Co., he could only have looked to Helbling for repayment; but, by the mortgage, he obtained a lien, as an indemnity, upon the property mortgaged, belonging to the entire firm. The security which he obtained in respect to his previous liability was an ample consideration for his agreement to endorse in the future for both the firm and for Helbling.

We have considered the case as if the firm had conveyed the property to a third person, having notice, actual or constructive, of the mortgage, before Brinkmeyer had endorsed for Helbling. We need not, therefore, determine whether Grayville and Browneller occupy the same position in respect to the property, that a third person would, if he had bought it from the firm, with notice of the mortgage. They occupy no better position, to say the least. In respect to notice, they, having with Helbling made the mortgage, must be taken to have had notice of it, as well as of its terms and contents.

We are of opinion, on the case made, that the appellant has a lien on the property, as against the appellees, by virtue of the mortgage, as an indemnity or security for whatever he may have paid, or for whatever he may be liable, on his endorsements for Helbling, as set up in the answer, and that the court erred in sustaining the demurrer to the answer.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

Petition for a rehearing overruled at the May term, 1877.[36]

EDITORIAL NOTE.—OBLIGATIONS OTHER THAN FOR PAYMENT OF MONEY. "It is not every conveyance of land upon a condition which

[36] This case was again before the Supreme Court in 57 Ind. 435, where Howk, J., says: "Under our construction of the appellant's mortgage, in the case of Brinkmeyer v. Browneller, supra, and we still adhere to that construction, the appellant was bound, and could be compelled to endorse for, or become the surety of, the appellee Anton Helbling, 'for an amount not to exceed four thousand dollars.' The fact that judgments had been rendered against said Anton Helbling would not absolve the appellant from this obligation; and, therefore, his knowledge of such fact, before he made advancements to, or incurred liabilities for, said Anton Helbling, could not and would not, under the law, affect his rights under his mortgage."

See also, Rowan v. Sharp's Rifle Co., 29 Conn. 282; Wilson v. Russell, 13 Md. 494.

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is in equity regarded as a mortgage. Early definitions of mortgages are found, where no other conditional conveyances are regarded as mortgages, but such as are made for the security of a loan of money. At another date we find the equitable doctrines as to mortgages extended to all cases where the conveyance is a security for any debt; and the most modern notion is to apply the same doctrines to cases generally, where conditional deeds are made as a security for the performance of a contract.

"But upon consideration it will be seen that this principle, though generally true, can have no application to any other contracts than such as by their non-performance create a debt, or a demand in nature of a debt, against the delinquent party. Wherever the condition, when broken, gives rise to no claim for damages whatever, or to a claim for unliquidated damages, the deed is not to be regarded as a mortgage in equity, but as a conditional deed at common law. It has the incidents of a mortgage only to a limited extent, and the party, if relieved by a court of equity from the forfeiture resulting from the non-performance of the condition, will not be relieved as in cases of a mortgage. It is not, however, intended to say that the same principle of justice which has led courts of equity to establish the system of relief from forfeitures in the case of mortgages, will not entitle a party to analogous relief in cases where the design of the parties is to make a conveyance by way of security. * * *" Bell, J., in Bethlehem v. Annis, 40 N. H. 34, 39.

NECESSITY OF CONSIDERATION. A mortgage executed and delivered as a gift is enforcible as between the parties. Bucklin v. Bucklin, 1 Abb. App. Dec. (N. Y.) 242; Brooks v. Dalrymple, 12 Allen (Mass.) 102; Campbell v. Tompkins, 32 N. J. Eq. 170; Brigham v. Brown, 44 Mich. 59. In the case first cited, Denio, J., says: "The plaintiff brings her suit in equity, not for the purpose of being aided in establishing her mortgage under the notion of remedying a defective conveyance, or obtaining a specific performance, but to foreclose and extinguish the defendants' equity of redemption, which a court of law is not competent to deal with. She does not come to establish a voluntary equitable agreement, but to enforce a legal title under an executed conveyance, and to cut off an equity attached to that legal title and vested in the defendants."

Of course, if the mortgage was not intended as a gift, want of consideration or failure of consideration raises a different question.

A mortgage executed to secure a pre-existing indebtedness is enforcible against the mortgagor and all who acquire the property from him subsequent to the mortgage and is not impeachable as a fraud upon creditors. But such a mortgage does not constitute the mortgagee a bona fide purchaser unless there is a new consideration such as the surrender of other securities or extension of time. Gafford

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v. Stearns, 51 Ala. 434; Withers v. Little, 56 Cal. 370; Busenbark v. Ramey, 53 Ind. 499; Gilchrist v. Gough, 63 Ind. 576; Boxheimer v. Gunn, 24 Mich. 372; De Mey v. Defer, 103 Mich. 239; Schumpert v. Dillard, 55 Miss. 348; Mingus v. Condit, 23 N. J. Eq. 313; Delancey v. Stearns, 66 N. Y. 157. *Contra,* Haynes v. Eberhardt, 37 Kans. 308; Brem v. Lockhart, 93 N. C. 191. See also Manning v. McClure, 36 Ill. 490. See also Jones, §§ 460, 461. Such a mortgage is also liable to attack as a preference under the Bankruptcy Act.

ILLEGALITY OF CONSIDERATION. If the mortgage secures a debt the consideration for which is illegal, it is usually held that neither party can maintain any action thereon, neither the mortgagee to foreclose or to obtain possession, nor the mortgagor to redeem or have the instrument cancelled. W— v. B—, 32 Beav. 574; Gilbert v. Holmes, 64 Ill. 548; Hyatt v. James, 2 Bush (Ky.) 463; Atwood v. Fisk, 101 Mass. 363; McQuade v. Rosecrans, 36 Ohio St. 442; Pearce v. Wilson, 111 Pa. St. 14. It has, however, been held that in spite of illegality the mortgagee can maintain ejectment upon the executed conveyance. Raguet v. Roll, 7 Ohio R. (part 2) 70. This holding obviously leads to injustice unless the mortgagor is permitted to redeem and, accordingly, in Cowles v. Raguet, 14 Ohio 38, another case growing out of the same mortgage, it was said that this was permissible. The result was, of course, to make the mortgage substantially enforcible.

The effect of usury is always prescribed by the statute defining usury.

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CHAPTER III.

INCIDENTS OF THE MORTGAGE RELATION.

SECTION 1.—POSSESSION.

ROCKWELL v. BRADLEY.

SUPREME COURT OF CONNECTICUT, 1816.
2 Conn. 1.

SWIFT, C. J.: The question is, whether an action of disseisin can be maintained, by the mortgagee, against the mortgagor, who continued in possession, without notice to quit.

The mortgagee, on the execution of the deed, is vested with the fee of the land, and is entitled to the immediate possession, though the law day has not elapsed. It is, however, the understanding of the parties, that the mortgagor shall retain the possession.

The principle contended for, on the part of the defendant, is, that the mortgagor continues in possession by the license, consent, and agreement of the mortgagee; that the possession is lawful; and that he can not become a disseisor, unless a surrender of possession be demanded, or a notice to quit be given. Of course, to maintain this action, we must treat as a disseisor a man who has lawful possession; which is repugnant to acknowledged principles.

To decide this question, we must consider the nature of the right of a mortgagor in possession. He has been likened to a tenant at will; but the resemblance is very remote; for, it is agreed, he would not be entitled to emblements,[1] or accountable for rent.[2] The truth is, such an estate is of a peculiar nature, precisely resembling no other. Lord Mansfield says, in Keech v. Hall, Dougl. 22, he is a tenant at will in the strictest sense. Though the inference from the fact that the mortgagor is left in possession, is an agreement that he shall continue it, yet this is under this condition, that he is so entirely subject to the will of the mortgagee, that he (the mortgagee) may consider his possession to be lawful, or treat him as a disseisor, without notice to quit. This results from the nature of an estate in mortgage, where the object is to give the mortgagee an ab-

[1] Gilman v. Wills, 66 Maine 273.
[2] See Morse v. Merritt, 110 Mass. 458.

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solute power over the pledge to enable him to secure or enforce the payment of the debt.[3]

Accord: Trumbull, Edmund, Smith and Brainard, JJ.

Contra: Baldwin, Hosner and Gould, JJ. [Maintaining that notice to quit was necessary.]

No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises. 2 Revised Statutes of New York (1828), p. 312, § 57.

Unless a mortgage specially provide, that the mortgagee shall have possession of the mortgaged premises, he shall not be entitled to the same. 2 Revised Statutes of Indiana (1852), p. 239, § 1.[4]

PHYFE v. RILEY.

SUPREME COURT OF NEW YORK, 1836.
15 Wend. (N. Y.) 248.

[This was an action of ejectment. The plaintiff claimed title through one Joseph Burke. The third point of defense was that the

[3] Accord: Carroll v. Ballance, 26 Ill. 9; Pettengill v. Evans, 5 N. H. 54. That the mortgagee may enter without legal proceedings, being liable, however, for any breach of the peace in so doing. Lackey v. Holbrook, 11 Metc. (Mass.) 458; Brown v. Cram, 1 N. H. 169; Tryon v. Munson, 77 Pa. St. 250.

In a few states it is held that the mortgagee can recover possession after default, but not before. Hill v. Robertson, 24 Miss. 368; Bailey v. Winn, 101 Mo. 649; Sanderson v. Price, 21 N. J. L. 637, note; Martin v. Alter, 42 Ohio St. 94.

When the mortgagee is at law entitled to possession, equity will not enjoin him from proceeding to enforce that right—Schwartz v. Sears, Walk. Ch. (Mich.) 170.

A stipulation reserving to the mortgagor the right of possession until default is in common use. As to its effect, see Gooding v. Shea, post. For cases of implied conditions to the same effect see, McMillan v. Otis, 74 Ala. 560; Flagg v. Flagg, 11 Pick. (Mass.) 475.

[4] One of the foregoing statutes or a similar one is in force in almost every lien state.

In several states this statute is the basis of the lien theory. Thus in Michigan the Supreme Court originally held the title theory (Stevens v. Brown, Walk. Ch. (Mich.) 41) but upon the enactment of a statute in 1843, similar to that of New York, supra, the court construed it broadly as changing the substantive nature of the mortgage. Crippen v. Morrison, 13 Mich. 23. See also Cullen v. Minnesota Loan & Trust Co., 60 Minn. 6.

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defendant was assignee of a mortgagee executed by the said Joseph Burke and was therefore a mortgagee in possession.]

By the Court, SAVAGE, C. J.: * * *

Previous to the adoption of the revised statutes, it was well settled that a mortgagee in possession of the mortgaged premises might protect his possession by force of his mortgage. 10 Johns. R. 480. 7 Cowen, 13. The revised statutes have not altered the law in this respect, unless it is by way of inference from the provision that no action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises. 2 R. S. 312, Par. 57. The cases deciding that a mortgagee might protect his possession by means of his mortgage, do not give as a reason for that decision that the mortgagee might recover possession in an action of ejectment; nor do the revised statutes necessarily alter the law as to the interest vested in the parties to the mortgage; they merely affect the remedy. Formerly, a mortgagee after forfeiture might pursue several remedies at the same time, and by so doing subject the mortgagor to unnecessary costs. The legislature may have intended merely to prevent oppression; they certainly did not intend to give an exposition of the rights of the mortgagor and mortgagee any farther than as to the particular remedy. Much of the difficulty in establishing an uniform rule in relation to mortgages grows out of the fact, that a mortgage has been differently considered in courts of equity and courts of law. In the former it is merely a security for money, in the latter it has been understood sometimes as a conveyance upon condition. In courts of law, in this state particularly, the mortgagor is considered the true owner against all the world except the mortgagee; and even the mortgagee has been considered merely an encumbrancer until forfeiture of the condition by non-payment of the money. Then and not till then is he considered as having an interest in the land; then, formerly, he might claim the possession by an action of ejectment, and upon the trial prove the condition broken, and thus show a complete title. Now, by the revised statutes, the mortgagee must complete his title by other proceedings before he brings his suit; but if the mortgagee, after forfeiture, obtains possession in some legal mode other than by an action, why should the mortgagor or those claiming under him recover the possession from the mortgagee without paying the money secured by it? He is still considered as having the legal estate after condition broken;[5] having that estate and being in possession, what reason can be given why he should be turned out of possession? Is it that he may be put to the trouble and expense of foreclosing his mortgage, and then bringing his ejectment? Such, surely, can not be the policy of the law; on the contrary, litigation and expense to parties will be saved by permitting

[5] Compare Runyon v. Messereau, supra.

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the mortgagee to retain possession, until the mortgagor or those claiming under him shall institute proceedings in a court of equity for the purpose of redemption. It has been decided that the estate of the mortgagor, before foreclosure, is a legal estate which may be sold on execution. Waters v. Stewart, 1 Caines' C. in Err. 66, 70. In Jackson v. Willard, 4 Johns. R. 41, it was decided that the interest of a mortgagee, after forfeiture and before foreclosure, can not be sold on execution while the mortgagor is in possession. Kent, Ch. Justice, says, "Until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action." "When the mortgagee has taken possession of the land, the rents and profits may, perhaps, then become the subject of computation and sale." It can not be denied that the mortgagee has an interest in the mortgaged premises, and that interest after forfeiture is a legal interest; it is indeed inchoate until foreclosure, but it has heretofore been considered sufficient to protect him in the possession of the mortgaged premises when legally obtained. Being unable to see in the revised statutes anything which changes this rule of law, I am unwilling to depart from previous adjudications, unless I can perceive a clear intention of the legislature to change the rule. On the whole case, therefore, it seems to me that the defendant is entitled to judgment.[6]

WALTERS v. CHANCE.

SUPREME COURT OF KANSAS, 1906.
73 Kans. 680.

[Ejectment. Answer, and demurrer thereto sustained.]

GREENE, J.: The material allegations of this answer were that on April 1, 1886, William T. Tartar, being the owner of the land in controversy, executed a mortgage thereon for $250, payable to Lew E. Darrow, due April 1, 1891; that the defendant was the owner of that mortgage; that it had not been paid; that on May 3, 1886, Tartar and wife conveyed the land to Alexander McCollum by warranty deed, and on September 3, 1887, McCollum conveyed the land by warranty deed to William Chance, who by a condition in the deed assumed and agreed to pay the mortgage; that on April 1, 1891, William Chance secured an extension of five years from that date for its payment; that for a long time prior to February 11, 1901, William Chance and his heirs had abandoned the land; that on the date last named the land was unoccupied; and that on that date de-

[6] Compare the remarks of Comstock, J., in Kortwright v. Cady, supra.

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fendant went into possession thereof under his mortgage, and has continued in the exclusive occupancy thereof ever since, claiming to be a mortgagee in possession.

* * * * * * *

The defendants in error contend that before the holder of a mortgage can invoke the defense of a "mortgagee in possession," in an action of ejectment, he must show that he took possession under his mortgage with the consent of the owner of the land. They also contend that the answer shows that no such consent was obtained; that, therefore, the entry was unlawful; and that an equitable defense can not be predicated upon an unlawful act. The decisions of this court, where the defense of a mortgagee in possession has been made, do not sustain the contention that the possession must have been acquired with the consent of the owner. In Kelso v. Norton, 65 Kan. 778, the mortgagee got possession under a void foreclosure sale, and it was held that he was a mortgagee in possession.[7] The facts in the case of Stouffer v. Harlan, 68 Kan. 135, were substantially the same, and it was again held that the mortgagee was entitled to the rights of a mortgagee in possession. In Rogers v. Benton, 39 Minn. 39, it was said that where the mortgaged land had been abandoned and the mortgagee had gone peaceably and quietly into possession, the owner could not maintain ejectment until he paid the mortgage lien, and that abandonment is an implied assent that the mortgagee may take possession under his mortgage. In Cooke v. Cooper et al., 18 Ore. 142, it was said:

"If he (the mortgagee) can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt." (Page 148.)

Whether the holder of a mortgage who is in possession is entitled to make the defense of a "mortgagee in possession," after condition broken, depends upon the equities of each case. No general rule applicable alike to all cases can be stated, except where the mortgagee enters under an express agreement with the owner. Of course, if he obtain possession by force, intimidation, deceit or fraud,[8] a court of equity will not permit him to profit thereby. But where,

[7] Accord: Miner v. Beekman, 50 N. Y. 337; Cook v. Cooper, 18 Ore. 142; Tallman v. Ely, 6 Wis. 244.

If the purchaser is a third person, the invalid foreclosure has the effect of an equitable assignment of the mortgage and if the purchaser takes possession peaceably he has the rights of a mortgagee in possession. Townshend v. Thompson, 139 N. Y. 152.

[8] Under the lien theory if the mortgagor's tenant without the mortgagor's consent surrenders possession to the mortgagee, the latter can not claim the rights of a mortgagee lawfully in possession. Russell v. Ely, 2 Black. (U. S.) 575. Compare Kimball v. Lockwood, 6 R. I. 138.

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after condition broken, the land is unoccupied, and he enters peaceably, a court of equity will not eject him at the suit of the owner until his lien upon the land shall have been satisfied. Such a rule does equity between the parties, and deprives the owner of the land of no rights. Mr. Justice Mason, speaking for the court in Stouffer v. Harlan, 68 Kan. 135, said:

"The expression frequently used, that the entry must be lawful, we interpret to mean not that it must have been effected under a formal right capable of enforcement by legal proceedings, but that it must not be through any unlawful or wrongful act, upon which the mortgagee would be estopped to found a right. (Page 145.)

If, after condition broken, the premises are unoccupied, the mortgagee may, if he can do so peaceably, enter into possession under his mortgage; and he can not be ejected therefrom by the owner until his mortgage lien has been fully satisfied. The land in question had been sold and deeded for the taxes of 1893. The owners had paid no subsequent taxes. No interest had been paid on the mortgage debt after 1895. In February, 1901, the land was unoccupied and "abandoned," as stated by defendant in his answer. The mortgagee went quietly and peaceably into possession, under his mortgage, and continued therein without objection until this action was commenced September, 1903. The facts pleaded are ample to sustain the defense of a mortgagee in possession. It was error therefore to sustain the demurrer.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer.

All the Justices concurring.

Porter, J., not sitting.

NEWTON v. McKAY.

SUPREME COURT OF MICHIGAN, 1874.
30 Mich. 380.

CAMPBEELL, J.: This was ejectment brought by Newton, as owner of the equity of redemption of lands, against McKay, who holds as assignee of a mortgage not in a shape to be foreclosed by advertisement, but which had been proceeded on by statutory foreclosure.

The facts appear substantially as follows: Newton holds by deed from the estate of one Belote, given by his administrator in August, 1869, under a probate decree enforcing a contract made by Belote for the sale of the land in 1868. McKay holds by assignment a mortgage made by Belote in 1866, irregualarly foreclosed in 1869, and by a deed from Belote's administrator, given in June, 1871. For

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some unexplained reason McKay went into possession in the summer of 1871. The court below sustained the legality of his possession as a mortgagee.

The first question to be considered is the character of this entry. It is claimed to have been with the mortgagor's consent. But when the entry was made, and when the deed was given by Belote's administrator to McKay, all the right of the estate had been divested by the previous conveyance under the probate decree. Thereafter Belote's estate had no further concern with the land, and permission from the administrator was no better than if Belote had never owned it. The question then arises, whether a mortgagee who goes into possession without the permission of the mortgagor, has a right to hold possession against him. It is claimed that such possession, peaceably obtained, may be upheld.

It was held in Mundy v. Monroe, I Mich. 68, that if the statute of 1843, forbidding ejectment suits by mortgagees before foreclosure, applied to existing mortgages, it was invalid, because impairing the obligation of contracts. In other words, it was held that this law was inconsistent with a contract which authorized the mortgagee to take possession, as he always could at common law. The court, in further declaring the object of the act to be to take away the right of possession from the mortgagee, merely expressed the same idea. It would be absurd to hold there could be a right of possession which could not lawfully be enforced. This holding was in no sense *obiter dictum*, but was the very thing decided.

In all the decisions and rulings made by this court since, this idea has been adhered to, and the right of possession has been denied. In Crippen v. Morrison, 13 Mich. 23, and Hogsett v. Ellis, 17 Mich. 351, the questions involved bore directly on the existence of any right of possession.

Where the mortgagee has no authority not derived from the mortgage itself, there is no middle ground between a right to sue for possession and no possessory right. The form of the mortgage remains as before. The right of possession, if it exists at all, exists because the legal title passes, and can be enforced by legal remedies. There can be no such things in existence at the same time as a mortgagor's right to hold possession and a mortgagee's right to hold it. One must be entitled, to the exclusion of the other.

If a mortgagor puts a mortgagee in possession, or gives him permission to enter, there may arise an inference that the license is given with a view of making the possession subservient to the purposes of the mortgage; and there may be convincing reasons for regarding such a possession as not subject to disturbance by the mortgagor without redemption. That question is not now before us. But whatever authority exists in such a case originates in the license and not in the mortgage, and forms no part of the original contract.

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When the law of 1843 was passed, the common-law doctrine of mortgages had become so far modified by the rules of equity that the last innovation was almost a corollary of former ones. Where a mortgagee's estate had been moulded into a mere security for a personal claim, and the estate in land passed by a parol transfer, and became personalty, the remedy by ejectment became incongruous. It must in many cases be brought in the name of a party having no interest of his own, or by one who traced his title without conforming to the rules of the statute of frauds, which requires estates to be transferred more formally. Where the estate in fee was regarded as belonging to the mortgagee, the possession belonged with it. When the fee was no longer regarded as passing, the possessory right became anomalous. It was an incident which had become severed from its principal, and which led to serious complications in settling the equities of foreclosure and redemption. The act of 1843 was the last thing needed to harmonize the law, and to place mortgages in fact, as they had long been in theory, in the condition of mere securities and chattel interests.

We are aware that in some states the courts have given a similar statute a construction which is absolutely literal, and maintains the right of possession, while forbidding its legal enforcement. We can not regard this as in harmony with the general rules of law. If the mortgagee in possession can insist on retaining it, his right must depend upon his contract, and, as already suggested, should be capable of enforcement. There can be no interest in lands which can not be enforced somewhere. And we can not imagine that the legislature would have taken pains to introduce, as a new and radical change, a measure that could at any time be rendered nugatory by an entry without force.

The decision in Mundy v. Monroe is not only to be respected as a precedent, but is in our view in full accordance with the purposes of the statute.

We think the court erred in rendering judgment for defendant on the finding.

The judgment must be reversed, and judgment entered for plaintiff, that he recover possession, with costs of both courts, and that the record be remanded, that defendant may have the benefit of any statutory application for a new trial to which he may become entitled.

The other Justices concurred.[9]

CAMPBELL, J., in HAZELTINE v. GRANGER, 44 Mich. 503 (1880).

The statute (denying ejectment to the mortgagee) does not say

[9] See also, Johnson v. Sherman, 15 Cal. 287; Lewis v. Hamilton, 26 Colo. 263; Rogers v. Benton, 39 Minn. 39; Russell v. Akeley Lumber Co., 45 Minn. 376. See also, 8 Col. L. Rev. 486.

In Byers v. Byers, 65 Mich. 598, Campbell, J., says: "If the mortgagor or owner of the fee chooses to put him in, the tenancy is at least

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that no ejectment shall lie unless there is an agreement to that effect, but that it shall not lie at all. Every mortgage made in common law form contains words whereby, if applied as they read, possession would belong to the mortgagee and his title would become absolute by default. The whole aim of equity was to arrest this forfeiture and not to allow the language of a mortgage to have any force against the equity of redemption. The statute is a further step in the same direction for the protection of mortgagors against agreements which, as literally drawn and as theretofore expounded, were deemed dangerous, and against public policy. The language of this mortgage expressly granting rents and profits on default is no stronger than the previous words of grant, and is really narrowed. It was no doubt intended to go further and to evade the statute. If it had contained an agreement that ejectment should lie, it could not very well be enforced against the clause of the statute prohibiting it. It can have no greater force in enlarging the jurisdiction of equity to appoint receivers, which we held in Wagar v. Stone, had been abolished.[10]

as good as a tenancy at will, and can not be destroyed without notice." In California it seems settled that under such circumstances the mortgagee may retain possession until he is paid. Spect v. Spect, 88 Cal. 437.

[10] Cf. Michigan Trust Co. v. Lansing Lumber Co., 103 Mich. 392; Guy v. Ide, 6 Cal. 99; American Investment Co. v. Farrar, 87 Iowa 437; Seckler v. Delfs, 25 Kans. 159.

"Our statute declares that 'a mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure.' Gen. Stat. 1878, chap. 75, § 29. In numerous decisions of this court, this statute has been recognized as changing the common-law relations and rights of mortgagors and mortgagees. The mortgagee is no longer entitled to the possession of the mortgaged premises before foreclosure by reason of his having any title or estate in the land. The mortgagor, having the legal title, may without doubt remain in possession until his title is divested, unless, in the application of the established principles of equity, and consistently with the legal title remaining in the mortgagor, the court shall find it necessary to lay its hand upon the property for the protection of the equitable rights of the mortgagee. The exercise of this power by courts of equity in the past was not based upon the ground that the legal title had passed from the mortgagor to the mortgagee; but upon the equitable rights of the mortgagee to have his security preserved so that it should be adequate for the satisfaction of the mortgage debt. Indeed, this power was exercised in favor of those who had no legal title, as in the case of junior mortgagees, and of securities given by the deposit of title-deeds. Berney v. Sewell, 1 Jac. & W. 647; Bryan v. Cormick, 1 Cox 422; Meaden v. Sealey, 6 Hare 620; Holmes v. Bell, 2 Beav. 298; High, Rec., §§ 640, 658, 682; Adams, Eq. 125. The jurisdiction of equity in the appointment of receivers, long exercised upon grounds peculiar to courts of equity, is not to be deemed to have been taken away by the statute unless that is its necessary effect, or at least its obvious purpose. Such is not the obvious purpose or necessary effect of this statute." Dickinson, J., in Lowell v. Doe, 44 Minn. 144, 146.

* * * "We are aware that the Supreme Court of California, in the case

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ALBERT, C. J., in FELINO v. NEWCOMB LUMBER CO., 64 Neb. 335 (1902). The only statutory regulation on the subject in this state is that to be found in section 55, chapter 73, Compiled Statutes, which is as follows: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." This provision leaves it competent for the parties to a mortgage to stipulate for the investiture of the mortgagee with the legal title and right of possession, which carries with it the right to the rents and profits.

EDITORIAL NOTE—RIGHTS OF THE MORTGAGEE AGAINST A TENANT OF THE MORTGAGOR.

If the mortgagee has the right to recover the possession from the mortgagor, he has the same right as against a tenant of the mortgagor holding under a lease executed subsequent to the execution of the mortgage, though the mortgagor was in possession when he made the lease. Keech v. Hall, 1 Doug. 21; American Freehold Land Mortgage Co. v. Turner, 95 Ala. 272; Russum v. Wanser, 53 Md. 92. But, as against a tenant whose lease antedates the mortgage, he stands in the position of an assignee of the reversion and can not evict the tenant. American Mortgage Co. v. Turner, supra.

On the other hand, in the latter case, the mortgagee, being an assignee of the reversion, can compel the lessee to pay to him the rent accruing since the date of the mortgage, which is due at the time of the mortgagee's demand and has not been already paid to the mortgagor, and all rent thereafter becoming due, unless, perhaps, it has been paid to the mortgagor in advance before the mortgagee's de-

of Guy v. Ide, 6 Cal. 99, held that, under a statute precisely like ours, it was not a proper practice to appoint receivers pending a foreclosure suit.

"The learned judge who rendered the opinion in that case says: 'Our statute forbids a mortgagee from recovering the mortgaged estate, and confines his remedy to a foreclosure. The same reason does not, therefore, exist, as by the English rule for appointing a receiver to collect the rents and profits pending the litigation.' This reasoning is, to our minds, incomprehensible. The argument is, 'Our law, having forbid the mortgagee to bring ejectment for the property mortgaged, it therefore becomes the duty of equity courts to deny him all security to be derived from the rents and profits, and all opportunity of protecting the property during litigation.' If it be taken for granted that it was the object of our legislature, in framing this part of the practice act, to discourage mortgages, and to render such securities uncertain and comparatively valueless, then we could understand this reasoning. But if the intention was merely to simplify proceedings in courts of justice and prevent multiplicity of suits, then we can not understand or appreciate the force of this argument.

"The legislature having forbid the mortgagee pursuing the common-law remedy of ejectment, would, it appears to us, be rather a reason for a more liberal exercise of the chancellor's powers to protect the security he has for his debt." Batty, J., in Hyman v. Kelly, 1 Nevada 179.

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mand. Tiffany, Real Property, § 521; Moss v. Gallimore, 1 Doug. 279; King v. Housatonic R. Co., 45 Conn. 226; Teal v. Walker, 111 U. S. 242; De Nichols v. Saunders, L. R. 5 C. P. 589; Stone v. Patterson, 19 Pick. (Mass.) 476. But, where the mortgage precedes the lease, the mortgage can not be called an assignment of the reversion and consequently, there being no privity of estate or contract between them, the mortgagee can not compel the lessee to pay rent to him. Teal v. Walker, 111 U. S. 242; Kimball v. Lockwood, 6 R. I. 138. Such a lessee may, however, in order to avoid eviction, *ut supra*, attorn to the mortgagee and such attornment is a defense to the mortgagor's claim for rent subsequently accruing. Kimball v. Lockwood, *supra;* Jones v. Clark, 20 Johns. (N. Y.) 51. As to whether such attornment creates a new tenancy between the lessee and the mortgagee for the unexpired term of the old lease, see Gartside v. Outlay, 58 Ill. 210.

As long as the mortgagor is permitted to remain in possession, he receives the rents and profits of the land as owner. Accordingly he can not be made to account to the mortgagee for rent received by him from a tenant of the mortgaged land. Teal v. Walker, supra. It has even been so held as to rent which, by reason of notice to the tenant, was payable to the mortgagee. Ex parte Wilson, 2 Ves. & B. 252. In such a case the mortgagee's remedy is against the tenant, whose obligation to the mortgagee is not discharged by payment to the mortgagor. Watford v. Oates, 57 Ala. 290.

If the mortgagee has no right to recover possession from the mortgagor, he, of course, has no such right against any tenant of the mortgagor, nor can he compel the lessee to pay rent to him, whether the lease was prior or subsequent to the mortgage. Teal v. Walker, *supra;* Hogsett v. Ellis, 17 Mich. 351. Nor is an attornment of the tenant to the mortgagee valid. Hogsett v. Ellis, *supra;* Mills v. Heaton, 52 Iowa 215; Russell v. Ely, 2 Black (U. S.) 575. After foreclosure, however, the position of the purchaser with reference to a tenant of the mortgagor would seem to be substantially the same as that of a mortgagee who is entitled to possession as against the mortgagor, *ut supra;* Simers v. Saltus, 3 Denio (N. Y.) 214; Batterman v. Albright, 122 N. Y. 484.

In those states where there is a statutory right of redemption after foreclosure sale, it is usually held that the purchaser acquires no title and no right of possession, until the expiration of the period allowed for such redemption. See Jones Mortgages, § 1661. But see Jones v. Thomas, 8 Blackf. (Ind.) 428.

The mortgagee in possession is held to an accounting under rules so strict as to make the possession a doubtful advantage. See post, Chap. VIII.

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SECTION 2.—THE MORTGAGEE'S LEGAL REMEDIES FOR INJURY TO THE MORTGAGED PREMISES.

GOODING v. SHEA.

SUPREME COURT OF MASSACHUSETTS, 1869.
103 Mass. 360.

Tort. The first count in the declaration alleged that the defendant forcibly entered the plaintiff's close, being the dwelling house numbered 8 on Brookline Street in Boston, tore out, took and carried away certain fixtures in said dwelling-house, and converted them to his own use. The second count alleged that Hiram Curtis was the owner of said dwelling-house, "subject to two mortgages, one of $5,000 and the other of $1,000, and interest on the same, and the said Curtis conveyed the same to the plaintiff, subject to said mortgages, to secure the payment of $3,000 and interest, before that time loaned and advanced to said Curtis by the plaintiff, and the defendant afterwards forcibly entered said dwelling-house and tore out, took and carried away" certain fixtures "in said dwelling-house and converted the same to his own use, by means whereof the plaintiff's said security for his said loan was greatly lessened and destroyed." The third and fourth counts were like the first and second, except that "dwelling-house numbered 9" was substituted for dwelling-house numbered 8." Writ dated August 27, 1868.

At the trial in the superior court, before Morton, J., without a jury, the following facts appeared: Curtis, being owner of both said houses, on September 16, 1867, mortgaged them to the Mechanics' Savings Bank of Lowell, each by a separate deed, and each to secure the payment of $5000 in six months from date; on February 7, 1868, he mortgaged them to Mary A. Lewis, each by a separate deed, and each to secure the payment of $1000 in four months from date; and on April 18, 1868, he mortgaged them to the plaintiff, each by a separate deed, and each to secure the payment of $3000. Each of these six mortgages contained a provision that until breach of condition the mortgagee should have no right to take possession. On June 20, 1868, the defendant entered the premises and tore away and removed water pipes and other fixtures attached to the realty; at which time the premises were in the possession of the mortgagor, and there had been no breach of the condition in the mortgages to the plaintiff. On July 11, 1868, the plaintiff took an assignment from Mary A. Lewis of the two mortgages to her; on July 30, 1868, entered to foreclose; and on August 28, 1868, sold the houses under powers of sale contained in the said two mortgages, bought them in himself for $2,000 each, and had subsequently con-

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veyed one of them for $9,400 by a warranty deed, and still held the other, which was of equal value. Since the alleged trespass, Curtis had been adjudged a bankrupt, and his assignee had brought suit against the defendant for the same trespass.

The defendant contended that, on these facts, the plaintiff could not maintain this action, and, even if he could, still if, on the evidence, the houses were of sufficient value over and above all prior incumbrances to pay the plaintiff his whole debt, he could recover in this suit only nominal damages, or only such sum as he had, by reason of the trespass, lost on his security. But the judge ruled that the plaintiff might recover the full amount of the damages to the estate by the alleged trespass; and found for the plaintiff for the full amount of all damages caused by the trespass. The defendant alleged exceptions.

WELLS, J.—There are two counts in the declaration relating to each lot of land and dwelling-house. The plaintiff is third mortgagee of each parcel, by separate mortgages, containing a clause against taking possession until breach. There had been no breach at the time of the alleged tort.

The first count, relating to each parcel, is in the nature of trespass *quare clausum fregit,* and can not be maintained because of the want of possession or right of possession at the time of the alleged trespass. Page v. Robinson, 10 Cush. 99; Woodman v. Francis, 14 Allen 198.

The second count in each case sets forth the actual condition of the title, and alleges that the defendant "forcibly entered said dwelling-house" and removed certain fixtures, "by means whereof the plaintiff's said security for his said loan was greatly lessened and destroyed." We do not think this count sets forth the entry as a violation of the plaintiff's possession, or possessory right; but only as the means by which an injury was caused to his mortgage security.

No question is raised here in regard to the liability of the defendant to some one for the fixtures so removed. The points of the defence are, that the mortgagee in possession can alone recover; or, if either mortgagee may do so, it must be the first mortgagee only.

The mortgagor might undoubtedly maintain an action of trespass; and damages for the unlawful removal of fixtures would be recoverable in such action by way of aggravation. Earle v. Hall, 2 Met. 353. For the removal of crops, or other property connected with the land, which the mortgagor himself might have removed, his right of recovery would be exclusive. Woodward v. Pickett, 8 Gray 617. But fixtures he could not himself remove, against the right of the mortgagee, nor permit to be removed; nor can he have any right to withhold the compensation or damages for them from the mortgagee, in whom the legal title is. The mortgagee may recover their value against the mortgagor or any other party who may

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be responsible for their removal. Cole v. Stewart, 11 Cush. 181. Such right to recover depends upon the title, and not upon possession, or the right of present possession, of the land. The right of present possession only affects the form of action in such case. Although the mortgagor in possession may recover, in an action of trespass, for the value of fixtures removed by a stranger to the title, his right to their value is subordinate to that of a mortgagee, and therefore can not be set up by the defendant to defeat a recovery for the same by such mortgagee. The mortgagor's right of action, based upon his possession, does not depend upon, nor necessarily include, the right to recover for the aggravation by removal of fixtures. Phelps v. Morse, 9 Gray 207. The right to recover the value of the fixtures is separable from that to recover for "breach of the close." Bickford v. Barnard, 8 Allen 314. It is incidental only to the action of trespass. But, as the injury affects the estate, it may be sued for directly by any one in whom the legal interest is vested. A second or third mortgagee, though not in possession, has a sufficient interest in the estate to maintain an action for such an injury. Although it is true that a stranger may thus be liable to either of the several mortgagees, as well as to the mortgagor, it does not follow that he is liable to all successively. The superior right is in the party having superiority of title. But the defendant can resist neither, by merely showing that another may also sue, or has sued. If he would defeat the claim of either, he must show that another, having a superior right, has appropriated the avails of the claim to himself. The demand is not personal to either mortgagee, but arises out of and pertains to the estate; and, when recovered, applies in payment, *pro tanto,* of the mortgage debt, and thus ultimately for the benefit of the mortgagor, if he redeem. It differs in this respect from the claim for insurance in King v. State Insurance Co., 7 Cush. 1, cited by the defendant. The defendant has the same means of protection against four judgments that any one has who is liable, for the same cause, to either of several parties having different or successive interests in the subject matter. Due satisfaction will discharge all the claims, if made to a party having the prior right. But neither can be defeated without some appropriation of the claim to the use of him who holds a prior right. Thus it is no defence to this suit, that the mortgagor has also a right of action; nor even that he has brought such an action; because the right of the plaintiff is superior to that of the mortgagor. A superior right in Mary A. Lewis will not avail, as the plaintiff has since become the owner of that title. Nor is the existence of a superior right in the savings bank, as first mortgagee, a defence. The defendant shows no satisfaction of that claim, no demand made upon him by the savings bank, and no authority or right from the bank to resist the claim of the plaintiff here, in behalf of or for the benefit of the first mortgagee.

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It is not contended that the plaintiff's mortgage has been satisfied and discharged by the proceeds of the sale under the power of sale in the Lewis mortgage. The correctness or fairness of these proceedings, and the responsibility of the plaintiff for the full value of the property, or the amount realized upon the second sale, may be open to the representatives of the mortgagor in a suit therefor; but this defendant is not in such privity as to be entitled to inquire into the relations or the state of the account, so far as it depends on equitable considerations, between the mortgagor and mortgagee.

The right of the plaintiff to recover in this action does not depend upon the sufficiency or insufficiency of his security. Until his whole debt is paid, he can not be deprived of any substantial part of his entire security without full redress therefor. Upon the facts reported, we are satisfied that the ruling of the judge who heard the case, allowing the plaintiff the full amount of the damages to the estate caused by removal of fixtures, was correct.

Exceptions overruled.[11]

SEARLE v. SAWYER.

SUPREME COURT OF MASSACHUSETTS, 1879.
127 Mass. 491.

MORTON, J.—This is an action of tort for the conversion of a quantity of wood and timber.

It appeared at the trial that one Warren, being the owner of a lot of wood-land, mortgaged it to the plaintiff's testator; and that, after the condition of the mortgage was broken, but before the mortgagee had taken possession, Warren cut the wood and timber in question and sold it to the defendant. The presiding justice of the Superior Court ruled that, "if the defendant bought of the mortgagor wood and timber cut from the mortgaged premises, and exercised such acts of ownership over the same as would amount to a conversion, then he would be liable to the mortgagee for the value of the same, without any previous demand, and although he bought the same in good faith and without any notice or knowledge of any claim upon the same." To this ruling the defendant excepted.

Upon the question whether, if a mortgagor commits waste by removing buildings, wood, timber, fixtures or other parts of the realty, the mortgagee out of possession can follow the property after

[11] Compare Sanders v. Reed, supra. In King v. Bangs, 120 Mass. 514, it was held that the trespasser might show "in mitigation of damages at least," that after the trespass and before the action was brought the mortgagee had exercised a power of sale, realizing enough to satisfy his debt.

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it has been severed, and recover it or its value, there have been conflicting decisions in different jurisdictions. In New York and Connecticut, it has been held that a mortgagee out of possession can not maintain an action at law for waste committee by the mortgagor; and that he has no property in wood or timber cut and removed, so as to enable him to maintain trover for its conversion. Peterson v. Clark, 15 Johns. 205; Cooper v. Davis, 15 Conn. 556. On the other hand, it has been held in Maine, New Hampshire, Vermont and Rhode Island, that timber, if wrongfully cut and removed by the mortgagor, remains the property of the mortgagee out of possession, and he may recover its value of the mortgagor or a purchaser from him. Gore v. Jenness,[12] 19 Maine 53; Frothingham v. McKusick,[13] 24 Maine 403; Smith v. Moore,[14] 11 N. H. 55; Langdon v. Paul,[15] 22 Vt. 205; Waterman v. Matteson,[16] 4 R. I. 539.

We are not aware that this precise question has been adjudicated in this state, but the previous decisions of this court, in regard to the rights of mortgagees and the nature of their interest in the mortgaged estate, are such as to lead to the conclusion that a mortgagee out of possession is entitled to timber, fixtures and other parts of the realty wrongfully served, and may recover them, or their value, if a conversion is proved. In Fay v. Brewer, 3 Pick. 203, it was held that a mortgagee in possession, but before foreclosure, could maintain an action on the case in the nature of waste against a tenant for life, for cutting down trees on the mortgaged land before he took possession, and the court in the opinion comment on the case of Peterson v. Clark, 15 Johns. 205, as not being of authority here, "since the law of mortgage in New York is so different from our own."

In Page v. Robinson,[17] 10 Cush. 99, it was held that a mortgagee, after condition broken, though not in actual possession, could maintain trespass against the mortgagor, or one acting under his authority, for cutting and carrying away timber-trees from the mortgaged premises, without license express or implied, from the mortgagee.

In Cole v. Stewart, 11 Cush. 181, it was held that an action at law would lie by a mortgagee not in possession against one who, under authority from the mortgagor, removed a building from the mortgaged land.

In Butler v. Page, 7 Met. 40, a second mortgagee sold to the defendant a building standing on the mortgaged land, who took it down and removed the materials. It was held that the administrator

[12] Assumpsit against purchaser for proceeds of his resale.
[13] Trover and trespass de bonis against purchaser.
[14] Trespass de bonis by purchaser against mortgagee who seized the lumber manufactured from the timber.
[15] Case for waste and trover against mortgagor.
[16] Replevin against mortgagor.
[17] Trespass quare clausum.

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of the mortgagor could not maintain trover for the materials, as the fee of the mortgaged premises was in the mortgagees, and the removal of the building vested no property in the materials in the mortgagor's representative.

In Wilmarth v. Bancroft, 10 Allen 348, a house standing on mortgaged land was partially destroyed by fire. The mortgagor sold to the defendant such materials as were saved, and brought this action to recover the price agreed to be paid. It was held that the fact that the mortgagee had claimed the agreed price, and forbidden the defendant to pay it to the mortgagor, was a good defense. The opinion is put upon the ground that the partial burning of the house, and the consequent severance of the unburnt materials, "did not terminate or affect the mortgagee's interest in the fixtures."

So it has been held in several cases that a mortgagee out of possession may maintain an action at law against the mortgagor or a stranger for removing fixtures and thus impairing the security. Gooding v. Shea, 103 Mass. 360; Byrom v. Chapin, 113 Mass. 308; King v. Bangs, 120 Mass. 514.

The fair result of these authorities is that, under our law, a mortgagee, is so far the owner in fee of the mortgaged estate, that, if any part of it is wrongfully severed and converted into personalty by the mortgagor, his interest is not divested, but he remains the owner of the personalty, and may follow it and recover it or its value of any one who has converted it to his own use. Stanley v. Gaylord, 1 Cush. 536; Riley v. Boston Water Power Co., 11 Cush. 11.

But the severance must be wrongful, and, where it is made by the mortgagor or one acting under his authority, whether it is wrongful or not will depend upon the question whether a license to do the act has been expressly given, or is fairly to be implied from the relations of the parties. The true rule is as stated in Smith v. Moore, 11 N. H. 55, and approved in Page v. Robinson, 10 Cush. 99, that acts of the mortgagor in cutting wood and timber, or otherwise severing parts of the realty, are not wrongful when from the circumstances of the case the assent of the mortgagee may be reasonably presumed. The relation between the mortgagor and mortgagee is a very peculiar one. The mortgagee takes an estate in fee, but the sole purpose of the mortgage is to secure his debt. Usually in this state the mortgage contains a provision that the mortgagor may retain possession until condition is broken. The object of this is that the mortgagor may have the use and enjoyment of his property, and it implies a license to use it in the same manner as such property is ordinarily used, and as will not unreasonably impair the adequacy of the security. If a mortgage be of a dwelling-house, the mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of the realty, which would not be wrongful because within the license implied from the relations

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of the parties. If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession, as was probably the case at bar, it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case, it is clear that he is entitled to take the annual crops, and wood for fuel. Woodward v. Pickett, 8 Gray 617. And we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If, in carrying on similar farms, it is usual and is good husbandry to cut and carry to market wood and timber to a limited extent, a license to do this might be implied from the relation of the parties.

The bill of exceptions furnishes us with so meagre and imperfect a history of the case, that we are unable to say how far these considerations are applicable in the case at bar. But the ruling of the presiding justice seems to have been general, that the defendant would be liable if the wood and timber were cut from the mortgaged premises, and to have excluded the question whether, under the circumstances of the case, the assent of the mortgagee thereto could fairly be presumed by the jury. We are of opinion that this question should be submitted to the jury, and, therefore, that a new trial must be ordered.

Exceptions sustained.[18]

CLARK v. REYBURN.

SUPREME COURT OF KANSAS, 1863.
1 Kans. 281.

By the court, COBB, C. J.—The defendant in error brought his action in the district court against the plaintiffs in error to recover a dwelling house as personal property; alleging in the petition that he is the owner thereof and the defendant detains the same, and recovered judgment.

The undisputed facts of the case are these:

One Brown and his wife mortgaged a parcel of land to Amos Rees, and the plaintiffs below afterwards became the owners of the mortgage by assignment, and after the making of the mortgage, said Brown placed a house on the land, and after the money secured by the mortgage became due, and before foreclosure, still being in possession, he and his wife sold the house to one Mrs. Fritzlin, who sold it to the defendants below, and removed and delivered it

[18] Compare Hoskin v. Woodward, 45 Pa. St. 42.

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to them off the mortgaged premises. They held possession under her title, and the mortgage had not been paid nor foreclosed when the action was commenced. The judgment must be founded on the hypothesis that the plaintiff below, by virtue of his mortgage, was the owner of the freehold of which the house in question was a part, and that the removal of the house converted it to a chattel without divesting his title. Is that hypothesis correct?

It has long been settled, both in this country and in England, that the mortgagor, both before and after breach of the condition of the mortgagee, is, in equity, the owner of the estate, and the mortgage a mere security for a debt. (See Kent's Com., Vol. 4, p. 158, et seq.)

The rule at law has been the subject of much judicial discussion and conflict of opinion. But it is believed to be the settled modern doctrine that the mortgagor in possession is, at law, both before and after breach of the condition of the mortgage, the legal owner, as to all persons except the mortgagee and those claiming under him. And in states where the common law on the subject has not been changed by statute, the mortgagee, for the purpose of protecting and enforcing the lien against the mortgagor, has the remedies of an owner, he may enter into and hold possession and take the rents and profits in payment of his mortgage debt, and may have his action of ejectment to recover such possession, and hence is sometimes called the owner. But except as to such remedies, and as to all persons except the mortgagee, the mortgagor in possession is to be regarded and treated as the owner of the estate, subject to a mere lien or charge. (4 Kent's Com., p. 160; Perkins v. Dibble, 10 Ohio 438; Rallston v. Hughes, 13 Ill. 568; Howard v. Robinson, 5 Cush. 123; Norwich v. Hubbard, 22 Conn. 587; Astor v. Hoyt, 5 Wend. 615.)

And in this state the legislature has not enlarged, but still further restricted the rights of the mortgagee, by providing that "in absence of stipulations to the contrary, the mortgagor of real estate may retain the right of possession thereof." Com. Laws, p. 355, par. 12.)

According to the principles above laid down, it is manifest that the allegation of the petition below, that the plaintiff is the owner of the house, was entirely unsupported by the facts appearing on the trial.

Nor is this objection to the judgment technical.

If such an action can be maintained, a mortgagee may recover from the purchasers all the timber, stone or other property severed from the realty and sold by the mortgagor, though its value may exceed the mortgage debt an hundred fold, and however ample the security may remain; although it is quite clear on principle and authority that the purchaser of property so removed by the mortgagor, can not be liable in an action for the waste beyond the actual

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loss the mortgagee thereby sustains. (Van Pelt v. McGraw, 4 N. Y. 110; Gardner v. Heartt, 3 Denio 232; Lane v. Hitchcock, 14 Johns. 213, 15 Johns, 205.)

The other points made in the case need not be examined.

The judgment of the district court must be reversed, and the cause remanded to the court below, with directions to render judgment for the plaintiffs in error for their costs in that court.[19]

VAN PELT v. McGRAW.

COURT OF APPEALS OF NEW YORK, 1850.
4 N. Y. 110.

Van Pelt sued Southworth and McGraw in the court of common pleas of Tompkins county, and declared in case for wrongfully and fraudulently removing rails, timber, &c., from certain lands on which the plaintiff held a mortgage, thereby injuring his security, &c. It was proved on the trial that in May, 1840, Almeron Baily and William E. Baily, being the owners of 119 acres of land in Dryden, Tompkins county, executed a bond and mortgage covering the same to Harvey A. Rice, to secure the payment of $500, one half payable in May, 1841, and one half in May, 1842. In August, 1842, Rice sold and assigned the bond and mortgage to the plaintiff, who instituted a foreclosure suit thereon, and obtained the usual decree for the sale of the premises in August, 1844. The amount then due on the mortgage including the costs of the foreclosure suit, was nearly $900. The mortgagors were insolvent, and the premises were inadequate security for this sum. On the sale under the decree, which took place in October, 1844, the premises produced only the sum of $575. Shortly before the sale and while the advertisement was running, the defendant McGraw, who had become the owner of the equity of redemption by conveyance from the mortgagors, avowing that he would "strip the land," proceeded to draw off rails, and to cut down and draw off valuable timber, &c. The premises were thereby considerably lessened in value. These acts were done by McGraw, and by Southworth aiding and assisting him, with full knowledge of the plaintiff's mortgage, and of the insolvency of the mortgagors.

The defendants' counsel requested the court to charge the jury that McGraw, having the fee of the land, and being in possession, had a right to take off the fences and timber, and that these acts being lawful could not be deemed to have been done wrongfully or fraudulently. The court charged that the acts were lawful if they

[19] Compare Sands v. Pfeiffer, 10 Cal 258; Berthold v. Holman, 12 Minn. 335; Stout v. Keyes, 2 Doug. (Mich.) 184.

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did not prejudice the plaintiff's rights or impair his security, but if the defendants had impaired that security with a knowledge of the lien, then their acts were wrongful and fraudulent. The defendants' counsel also requested the court to charge, that inasmuch as the plaintiff had alledged in his declaration that the defendants did the acts fraudulently and with a design to injure the plaintiff, he was bound to prove those allegations by other evidence than the mere removal of the rails and timber for their own emolument. The court refused so to charge. To the charge as delivered and to the refusal to charge as requested, the defendants excepted. The jury found a verdict of $150 in favor of the plaintiff. The judgment entered thereon was affirmed in the Supreme Court on error brought. The defendants appealed to this court.

PRATT, J.—There is no doubt but that an action on the case will lie for an injury of the character complained of in this case. It forms no objection to this action that the circumstances of the case are novel, and that no case precisely similar in all respects has previously arisen. The action is based upon very general principles, and is designed to afford relief in all cases where one man is injured by the wrongful act of another, where no other remedy is provided. This injury may result from some breach of positive law, or some violation of a right or duty growing out of the relations existing between the parties. (1 Cow. Treat. 3.)

The defendant McGraw, in this case, came into the possession of the land subject to the mortgage. The rights of the holder of the mortgage were therefore paramount to his rights, and any attempt on his part to impair the mortgage as a security, was a violation of the plaintiff's rights. But the case is not new in its circumstances. The case of Gates v. Joice, 11 John. 136, was precisely like the case at bar in principle. That action was brought by the assignee of a judgment against a person for taking down and removing a building from the land upon which the judgment was a lien. The plaintiff's security was thereby impaired. The court in that case sustained the action. The decision in that case was referred to and approved in Lane v. Hitchcock, (14 John. 213), and in Gardner v. Heartt, (3 Denio. 234). Nor is there any thing in the case of Peterson v. Clark, (15 John. 205), which conflicts with the principle of these cases. That was an action by a mortgagee in the usual form of an action for waste. The declaration alleged seisin in the plaintiff, upon which the defendant took issue. There was no allegation that the mortgagor was insolvent, or the judgment as a security impaired. The only issue to be passed upon, was that in relation to the seisin. It is quite clear that upon such an issue the mortgagee must fail. Now this action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a se-

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curity has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be. It could, therefore, be of no consequence whether the injury occurred before or after forfeiture of the mortgage. The action is clearly maintainable.

It only remains, therefore, to be considered whether there was any error in the charge of the court. In order to come to a correct conclusion upon this point, it becomes necessary to examine the exceptions to the charge in connection with the undisputed testimony in the cause, and the propositions upon which the court were required to charge. It had been proved that the defendants knew of the mortgage, that the mortgagors were insolvent, and that the property had been advertised for sale by virtue of the mortgage. They were forbidden to remove the fences and timber, for the reason that the security would thereby be impaired. It was also proved that the value of the mortgage had been impaired by such removal. Under this state of facts the defendants' counsel asked the court to charge the jury, that McGraw having the fee of the land, and being in possession, had a right to take off the fences and timber; that the acts being lawful, could not be deemed to have been done wrongfully or fraudulently. The court charged that the acts were lawful if they did not prejudice the plaintiff's rights or impair his security, but that if they had impaired the security, knowing the plaintiff's lien, they were liable. As an answer to the propositions of the defendants' counsel, the charge was correct. Acts may be harmless in themselves, so long as they injure no one, but the consequences of acts often give character to the acts themselves. It is upon this distinction that the maxim is based, *sic utere tuo est alienum non laedas.* As I have before observed, the lien of the plaintiff upon the land was paramount to any interest which the defendants possessed therein, and any wilful injury of that lien by them was a violation of the plaintiff's rights, for which an action would lie.

The defendants' counsel also asked the court to charge that the plaintiff having alleged in his declaration that the defendants did the acts fraudulently and with design to injure the plaintiff, he was bound to prove the allegations by evidence other than the mere act of removing the timber for the emolument of the defendants. The court refused so to charge, to which there was an exception. This proposition is somewhat obscure, but I understand it to mean that the plaintiff should prove that the primary motive of the defendants was to cheat the plaintiff. If the defendants knew that by taking off the timber the value of the plaintiff's mortgage as a security would be impaired, they would be legally chargeable with a design to effect that object, although their leading motive may have been their own gain. A man must be deemed to design the necessary consequences of his acts. If, therefore, he does a wrongful act, knowing that his

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neighbor will be thereby injured, he is liable. It is upon this principle that persons are often chargeable with the intent to defraud creditors, or to commit any other fraud. The immediate motive is oftentimes self-interest, but if the necessary consequence is a fraud upon his neighbor, the actor is legally chargeable with a design to effect that result. Upon the whole, therefore, although the charge is not quite so explicit as it should be, yet taken in connection with the propositions presented to the court, I think it was substantially correct. The judgment of the Supreme Court should be affirmed.

Judgment affirmed.[20]

TOMLINSON v. THOMPSON.

SUPREME COURT OF KANSAS, 1882.
27 Kans. 70.

The opinion of the court was delivered by

HORTON, C. J.—This action was tried by the court below without the intervention of a jury, upon the following agreed statement of facts:

"1. That Mary A. Tinney and Truelove Tinney, on the first day of July, 1878, made and delivered to Howard M. Holden, their promissory note for $1,932, secured by a mortgage on the south half of section two, township seven, range two, east, in Clay county, Kansas, as stated in this petition; that said mortgage was duly recorded in the office of the register of deeds, Clay county, Kansas, on the 18th of July, 1878; and that thereafter, said note and mortgage were duly indorsed, signed, and delivered to said plaintiff, A. A. Tomlinson.

"2. That on the 20th day of March, 1879, the said A. A. Tomlinson commenced a suit in the district court of Clay county, Kansas, against the said Mary A. Tinney and Truelove Tinney on the said note and mortgage, and on the 9th of May, 1879, recovered a judgment in said court against the said Mary A. and Truelove Tinney, on said note for $1,981.30 with interest from date of judgment, at 10 per cent. per annum, and costs of suit, amounting to $48.05 and also a decree foreclosing said mortgage, and an order to sell the above-decribed lands and tenements to satisfy said judgment and costs, and execution for any balance.

"3. That pursuant to said judgment and decree, and on an order of sale issued by the clerk of said district court, the sheriff of said Clay county, after causing said lands to be duly appraised and advertised, on the 7th of July, 1879, said sheriff publicly offered said

[20] Compare. Taylor v. McConnell, 53 Mich. 587; Corbin v. Reed, 43 Iowa 459.

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lands and tenements for sale to the highest bidder, according to law, and at said last-named date sold the same to A. A. Tomlinson, plaintiff, for the sum of $1,400, that sum being the highest bid offered, and over two-thirds of the appraised valuation, which sale was afterward, September 17, 1879, duly confirmed by said district court of Clay county, and said sheriff ordered to make and deliver to said Tomlinson, the purchaser, a deed therefor, which deed was thereafter so made and delivered.

"4. That after the payment of costs in said foreclosure suit, and application of proceeds on the said judgment, there still remained due said plaintiff on said judgment the sum of $732.35, which has not been paid by said Mary A. Tinney, Truelove Tinney, or any one for them; that after the sale of said lands and tenements aforesaid, the said A. A. Tomlinson caused an execution to issue against the said Mary A. and Truelove Tinney, directed to the sheriff of said Clay county, for the balance due on said judgment, which execution was returned by the sheriff, 'no goods, chattels, lands or tenements' upon which a levy could be made; that said Mary A. Tinney and Truelove Tinney are now, and have been since redition of said judgment, insolvent, and not possessed of any property out of which the balance of said judgment could be made.

"5. In the month of April, 1879, the house situated on the mortgaged premises was sold by the said Mary A. and Truelove Tinney to one C. W. Lindner, and while being moved off the mortgaged land, and when on the land of the said defendant, D. W. Thompson, adjoining the mortgaged lands of said Tinney, was purchased from said Lindner by the said defendant Thompson, in said month of April, 1879.

"6. At the time of said purchases, both Lindner and Thompson had actual knowledge of the mortgage lien aforementioned on said lands and tenements, and that said house was removed off said mortgaged premises.

"7. Both Lindner and Thompson paid full value for said house.

"8. Said house, at the time it was moved off said mortgaged lands, was worth $400."

The district court rendered judgment for the defendant for costs, and the plaintiff brings the case here.

We think that the judgment must be affirmed, because the action of the plaintiff is not maintainable. It appears from the record, that while Thompson had actual knowledge of the mortgage lien of the plaintiff on the lands of the Tinneys, he did not purchase the house in controversy until it had been removed from the lands, and that he paid full value therefore. The judgment in the foreclosure action was not recovered until after the purchase; and at the time of the purchase it does not appear that Thompson had any knowledge of the insolvency of the Tinneys, or that plaintiff would be defeated in

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the recovery of all his claim by the removal of the house. It does not appear that Thompson acted fraudulently, or that he intended to injure the plaintiff or anyone else. We do not see that he was guilty of either moral or legal fraud, and therefore the case of Yates v. Joyce, 11 Johns. 136, is not applicable. While the decisions in Clark v. Reyburn, 1 Kansas 281, and Vanderslice v. Knapp, 20 Kans. 647, are based upon facts somewhat different from those disclosed in the record, the principles therein declared virtually control this case. We have examined Van Pelt v. McGraw, 4 N. Y. 110, and all the other cases cited by counsel for plaintiff, and notwithstanding the views therein expressed, we think the rule here adopted the proper one. In Cooper v. Davis, 15 Conn. 556, it was held that where A executed to B a mortgage of certain real estate upon which there was a grist mill, and B obtained against A a decree of foreclosure and a judgment in ejectment for the possession, but before the expiration of the time limited for redemption, and before B had taken possession under the judgment or otherwise, A severed the stones from the mill and sold them to C, and B afterward having found them, took possession of them as his own property, that C was entitled to recover in an action of trover against B for the mill-stones. See also Buckout v. Swift, 27 Cal. 433; King v. Smith, 2 Hare 239; Pierce v. Goddard, 22 Pick. 559; Citizens' Bank v. Knapp, 22 La. An. 117; Challis v. Stearns, 22 N. H. 312. In Vanderslice v. Knapp, supra, Mr. Justice Valentine, speaking for the court, says:

"A mortgagor of real estate has the right to possession of the mortgaged property, and the right to sever and remove the timber, wood, sand, earth, stone, or anything else, therefrom, and sell the same, unless it unreasonably impairs the mortgage security; and when it impairs the mortgage security, the remedy of the mortgagee is not at law, but in equity; not in replevin, to recover the property severed from the realty, but generally by injunction to restrain the commission of waste upon the realty."

The judgment of the district court will be affirmed.

VALENTINE, J., concurring.[21]

[21] Compare, Gardner v. Heartt, 3 Denio (N. Y.) 232; Wilson v. Maltby, 59 N. Y. 126; Webber v. Ramsey, 100 Mich. 58.

On the right of the mortgagee to enjoin waste, see post, Chap. VIII. On the right of the mortgagee to foreclose on severed property, see post, Chap. IX.

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CHAPTER IV.

DISCHARGE OF MORTGAGES.

SECTION 1.—PAYMENT AND TENDER.

LITTLETON, TENURES, § 332. * * * And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him forever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant.

§ 335. And be it remembered that in such case, where such tender of the money is made, (at the day appointed) and the feoffee refuse to receive it, by which the feoffor or his heirs enter, &c., then the feoffee hath no remedy by the common law to have his money, because it shall be counted his own folly that he refused the money, when a lawful tender of it was made unto him.

GROVER v. FLYE.

SUPREME COURT OF MASSACHUSETTS, 1863.
5 Allen (Mass.) 543.

Writ of entry. The demandants claimed title under the levy of an execution by selling the equity of redemption of the premises.

At the trial in the superior court, before Lord, J., it appeared that at the time the levy was made the premises appeared on record to be subject to a mortgage to the Blackstone Loan and Fund Association, to secure certain sums of money a portion of which was not then due; that full payment of said sums had been made and a discharge of the mortgage and release of the premises by the said association executed before the levy, but the discharge and release were not recorded until afterwards; and that neither the judgment creditor nor the officer had actual or constructive notice of such discharge until the record thereof. The judge ruled that it was immaterial, for the purposes of this action, whether the mortgage upon the premises

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had been discharged, unless the creditor or officer had actual or constructive notice thereof before the seizure of the land on the execution, and that a sale of the equity without such notice was regular and proper.

The jury returned a verdict for the demandants, and the tenants alleged exceptions.

BIGELOW, C. J.—It is admitted that the sums due on the mortgage to the Loan Fund Association were paid before the sale of the right in equity to redeem was made by the officer; and that these payments were made at or before the times when the several instalments became due according to the stipulation set forth in the condition of the mortgage and the bond which accompanied it and formed part of the transaction. By such payment, on familiar principles, the condition was saved and the mortgagor, the tenant, was in of his old estate. No conveyance or discharge of the mortgage was necessary to revest the estate in the mortgagor, or to defeat the title of the mortgagee. Merrill v. Chase, 3 Allen 339, and cases cited. Joslyn v. Wyman, ante, 62. The argument, therefore, of the demandants, founded on the necessity of recording a release or discharge of a mortgage in order to defeat a title acquired by a judgment creditor by a sale or execution of a right in equity made after such release or discharge but without actual notice thereof, falls to the ground. The act of payment in the country *ante vel apud diem* saves the forfeiture of an estate held by a conveyance defeasible on a condition subsequent. No record of such an act is necessary to make the estate a fee simple estate in the grantor or mortgagor, as against all persons claiming by a subsequently acquired title. The release of the Loan Fund Association to the mortgagor was a useless and superfluous act, which added nothing to the strength of the title which he had acquired by a performance of the condition of the mortgage before a breach.

It follows, that the title of the demandants under the sale of the right in equity to redeem the estate is invalid. The premises being unincumbered and held by the judgment debtor as an estate in fee at the time of the service of the execution, could be legally levied on only by an appraisement, and set off in the mode prescribed by law. Forster v. Mellen, 10 Mass. 421; Freeman v. McGaw, 15 Pick. 82; Perry v. Hayward, 12 Cush. 344.

Exceptions sustained.[1]

[1] See also, Schearff v. Dodge, 33 Ark. 340.

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WATSON v. WYMAN.

SUPREME COURT OF MASSACHUSETTS, 1894.
161 Mass. 96.

HOLMES, J.—This is a bill in equity for the cancellation of a mortgage, but containing an offer to pay any sum that may be found due upon it. The defendant Davis took an indorsement of the note and an assignment of the mortgage for value before maturity, and without notice. Before he did so the mortgagor had given the mortgagee a second mortgage for a sum including that due on the first mortgage and in satisfaction of it, but had left the first mortgage in the mortgagee's hands. On the same day the plaintiff bought the second mortgage.

Payment of the mortgage note on the day when it falls due is performance of the promise, and very possibly would discharge the note even as against one who took it for value and without notice later on the same day. But payment before the day, or a satisfaction like that in the present case, is a defence which binds only the party receiving payment and those who stand in his shoes. Burbridge v. Manners, 3 Camp. 193, 194; Morley v. Culverwell, 7 M. & W. 174, 181, 182; Kernohan v. Durham, 48 Ohio St. 1, 7; Head v. Cole, 53 Ark. 523, 524; Palmer v. Marshall, 60 Ill. 289, 293. See Wheeler v. Guild, 20 Pick. 545, 552, 553, 555.

It commonly is assumed that the mortgage follows the note, and that if the holder can recover on the note he may avail himself of the mortgage. Taylor v. Page, 6 Allen 86; Carpenter v. Longan, 16 Wall. 271; Jones, Mort. (4th ed.) pars. 834-840. We are of opinion that this is the law where the note has been paid in full in advance. As is pointed out in Morley v. Culverwell, *ubi supra,* payment before the day is not performance of the contract, and it follows, notwithstanding the language often used, that in a strict sense it does not satisfy the condition of the mortgage. If we are right in our concession as to the effect of a payment on the day, we have here technical reason for the different effect of an earlier payment. The note still stands unperformed, and therefore secured, subject only to a personal defence, as it is happily called by Mr. Ames. 2 Ames, Bills & Notes, 811. But the very meaning of a personal defence is, that it does not accompany the note into all hands, but only into those which are in no better position than the person against whom it has accrued. Like fraud or duress by threats, it leaves the legal transaction still in full force, and only furnishes a reason why a particular person should not be allowed to insist upon it. It "all proceeds upon an *argumentum ad hominem.* It is saying you have the title, but

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you shall not be heard in a court of justice to enforce it against good faith and conscience." Eyre, C. J., in Collins v. Martin, 1 B. & P. 648, 651, cited by Shaw, C. J., in Wheeler v. Guild, 20 Pick. 545, 551.

Another argument drawn from the registry laws deserves consideration. A mortgage can not be extinguished more effectually than by a release. Yet we presume that it hardly would be argued that an unrecorded release would be valid as against a purchaser of the mortgage before maturity and without notice. As was said in a case which settled the law for Massachusetts, "a prior unrecorded deed has no effect except as between the parties to it, and others having notice of it. It is the policy of our laws that a purchaser of land, by examining the registry of deeds, may ascertain the title of his grantor. If there is no recorded deed, he has the right to assume that the record title is the true title. The law has established the rule, for the protection of creditors and purchasers, that an unrecorded deed, if unknown to them, is as to them a mere nullity." Dow v. Whitney, 147 Mass. 1, 6. It might be thought that the same considerations apply to a *quasi* discharge by payment of the whole amount in advance. The mortgagor may have an entry made on the margin of the record of the mortgage. Pub. Sts. c. 120, pars. 24, 25. When no such entry is made, and the registry contains no notice of payment of any kind, it would seem that one to whom the mortgagee produces the note not yet due and the mortgage for sale has the same right to assume that the record title is the lease. If the note were overdue, that would be notice, or would put the purchaser in the position of one having actual notice, and therefore in that case the registry laws would not help him.

In Grover v. Flye, 5 Allen 543, the demandant claimed title under a sale of an equity of redemption on execution. In fact, the mortgage had been paid in full before it was due, but the record did not disclose the payment, and neither the officer nor the demandant had notice of it. The court held that the rule was the same that it would have been between the original parties. In such a case the purchaser, of course, does not claim as indorsee or holder of the mortgage note. We accept the authority of the decision so far as it goes. But if it is not to be distinguished satisfactorily from one like the present, so far as the argument from the registry laws is concerned, it has no bearing on the considerations first stated, and those are sufficient to dispose of the case. It follows that the decree sustaining the mortgage in the hands of the defendant Davis, and limiting the plaintiff to a right to redeem, was correct.

Decree affirmed.

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BROWN v. COLE.

COURT OF CHANCERY OF ENGLAND, 1845.
14 Simons 427.

Bill to redeem a mortgage for a term of years, made on the 1st of April, 1844.

The proviso for redemption stipulated that the mortgagee should reassign the mortgaged premises, on being repaid the money lent, on the 1st of April, 1845, with interest in the meantime, by quarterly payments.

The mortgagor, having had an advantageous offer, for the purchase of the premises shortly after the mortgage was made, tendered to the mortgagee the amount of the principal, and of the interest up to the 1st of April, 1845, together with a reassignment of the mortgaged premises; but the mortgagee would neither accept the money nor execute the deed; in consequence of which the bill was filed.

The defendant demurred to the bill for want of equity.

The vice-chancellor allowed the demurrer, on the ground that it was contrary to the practice of the court to decree the redemption of a mortgage before the day appointed for that purpose had arrived.[2]

STEWART v. CROSBY.

SUPREME COURT OF MAINE, 1863.
50 Maine 130.

DAVIS, J.—The defendant, having claims against one Charles Hanson, commenced suits thereon, and caused his right of redeeming certain real estate, previously mortgaged by him, to be attached, September 15, 1848. Judgments were recovered February 17, 1854; executions were issued March 17, and Hanson's right of redemption seized thereon the same day; and, on April 22, of the same year, the officer duly sold to the defendant all of Hanson's right to redeem, which he had at the time of the attachment.

October 23, 1854, the defendant sold to the plaintiff, by a quitclaim deed, "all the right, title, and interest acquired by him by virtue of his deed" given to him by the sheriff upon the sale referred to. The plaintiff, upon inquiry, afterwards ascertained that Hanson, after the attachment, and before the seizure of his right of redemption upon the executions, had fully paid the mortgage debt. But the

[2] Compare, Bowen v. Julius, 141 Ind. 310.

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mortgage had not been discharged, either by an entry upon the record, or in any other manner.

The plaintiff claims that such payment was itself a discharge of the mortgage, so that Hanson's title was no longer a right of redemption, which could be sold by the sheriff, but a fee, upon which the execution should have been extended. And he has brought this suit to recover back the purchase-money, on account of the failure of title.

The defendant does not concede that the plaintiff would be entitled to recover, if there was a failure of title, as he has alleged, as he gave a mere release, with no covenants of title. But he contends that the mortgage was not discharged by payment, merely; and that, if the mortgage debt had been paid, it was a benefit, and not an injury, to the plaintiff.

In the case of Martin v. Mowlin, 2 Burrow 978, Lord Mansfield is reported to have said, "A mortgage is a charge upon the land, and whatever would give the money will carry the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts. It will go to executors. The assignment of the debt, or the forgiving it, will draw the land after it, as a consequence, though the debt were forgiven only by parol," &c.

The case under consideration was a suit at law; and the confounding of principles of law with those which prevail in equity, only, is probably due to the reporter, whose language it is. For he admits, in publishing his notes of cases, that he did not always take down the restrictions with which a proposition was qualified, "to guard against its being understood universally, or in too large a sense." 1 Burr. 9.

It is worthy of notice that in that case, as generally in English mortgages, the condition was, that, upon performance, the mortgagee should reconvey the premises:—and not, as in this country, that the deed should be void. It would seem therefore to be certain that payment on the law day would not have revested the title in the mortgagor, without such reconveyance. Harrison v. Owen, 1 Atk. 520; 2 Cruise, (London ed.,) 110. Upon mortgages to be void upon performance, such as are usually given in the United States, it is everywhere conceded that payment before condition broken will divest the mortgagee of his title, without reconveyance, or other discharge. 1 Washburne on Real Prop., 543; Whitcomb v. Simpson, 39 Maine 21; Holman v. Bailey, 3 Met. 55.

In this country there has been a constant tendency to apply the views attributed to Lord Mansfield indiscriminately, at equity, and in law. Sustained by such jurists as Chancellor Kent, Judge Story and Mr. Greenleaf, it is not strange that the weight of authority should turn in that direction. But in Maine, Massachusetts, Con-

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necticut and in several other states, the old doctrines of the common law still prevail. Though in equity the mortgage is an incident, and the debt the principal thing, at law the mortgage is a conveyance of the title, to be defeated upon a condition subsequent. Unless thus defeated, the legal title is in the mortgagee. He may assign the debt without the mortgage, in which case he holds the mortgage in trust for such assignee. Or, he may assign the mortgage without the debt, or, the mortgage to one, and the debt to another, the owner of the mortgage always holding in trust for the owner of the debt. So that the assignment of the debt operates as the equitable, but not as the legal assignment of the mortgage. And payment of the debt, after condition broken, does not divest the mortgagee of his legal title; but the mortgagor must resort to equity for a release, or a reconveyance. These principles, though extensively denied in this country, are sustained by so many decisions in the states before referred to, that it is unnecessary to cite them. 1 Washburne 553; 1 Hilliard on Mort., 476.

Mr. Greenleaf collects the authorities, in the first volume of his edition of Cruise, and in support of the opposite doctrine suggests that the acceptance of payment, after condition broken, is a waiver of the condition, and has the same effect as a performance of it. 1 Greenl. Cruise 595. But this is more specious than sound.

A waiver of the condition may operate to confer the same rights as a performance of it. This is the case in regard to bonds for the conveyance of real estate. But it does not follow that such a waiver can operate, by our laws, to convey or release a legal title to real estate. It can not do so, in the case of a mortgage, any more than of a bond. So that this theory, like all others in support of the doctrine, rests upon a denial that the mortgagee has the legal title, until after foreclosure.

But another answer to it is, that such an acceptance of payment is not a waiver. A waiver is a voluntary relinquishment of some right. But the mortgagee relinquishes nothing in such a case. The mortgagor pays it as a matter of right; and it is not at the option of the mortgagee whether it shall be paid or not, until the right of redemption expieres. A receipt of payment after that would be a waiver of the forfeiture; but before forfeiture, the mortgagor, by payment, acquires a right to a release, or a reconveyance, not on the ground of waiver, but of contract, and of law.

But though it is well settled in this state, that upon payment after condition broken, the legal estate remains in the mortgagee, until it is released, so that the mortgagor can not maintain a writ of entry against him; it is equally well settled that, in such case, the mortgagee, not being in possession, can not maintain such an action against the mortgagor. Hadlock v. Bulfinch, 31 Maine 247; Williams v. Thurlow, 31 Maine 392. The reason assigned for this is,

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that by our statutes, in all actions upon mortgages, there must be a conditional judgment; and, if the debt has been paid, so that there can not be such judgment, the demandant can not recover at all. Wade v. Howard, 11 Pick. 289; Webb v. Flanders, 32 Maine 175; Gray v. Jenks, 3 Mason 520. Where there is no provision of statute to prevent, as in an action of forcible entry and detainer, it has been held that a suit for possession may be maintained by the mortgagee, after payment. Howard v. Howard, 3 Met. 548, 557.

The mortgagee, after such payment, holds but a naked trust, without any interest. As in other like cases of holding in trust, he can derive no benefit from it, and can convey no title except as subject to it. And the estate can not be taken for his debts, though it can be taken for the debts of the *cestui que trust*. As the mortgagee's title in such case is of no value, there can be no motive for transferring it to a third party; and therefore it is seldom done in this country. That it may be done, would seem to admit of no doubt. Dudley v. Cadwell, 19 Conn. 218. Such a deed, says Wilde, J., in Wade v. Howard, before cited, conveys "the legal estate, or a satisfied mortgage; such an estate as is frequently purchased in England, to be tacked to a subsequent mortgage." Numerous cases of this kind may be found cited in the English editions of Cruise, vol. 2, c. 5, which Mr. Greenleaf has omitted, because the doctrine of tacking mortgages does not prevail in the United States.

There is no difficulty in applying these principles to the case at bar. When the executions against Hanson were issued, he had paid the mortgage debt, but the mortgage itself had not been discharged. If the payment had been before the condition had been broken, that would have revested the estate without any discharge; and there would have been nothing to seize on the exception. Grover v. Flye, 5 Allen 543. But payment after breach of the condition had no such effect. His interest in the premises was clearly liable to be seized on the executions; and the only question is, how should the levies have been made;—by a sale? or by an extent?

If, at the time of seizure upon the executions, there had been not only a payment of the mortgage debt, but a release of the mortgage, recorded in the registry of deeds, then there could have been no sale of an equity of redemption, though the mortgage was in force at the time of the attachment upon the writs. Foster v. Mellen, 10 Mass. 421. In Pillsbury v. Smyth, 25 Maine 427, the report of the case does not show whether the discharge of the mortgage had been recorded. And we need not determine whether, if there is a release, but not on record, the officer may not proceed as if none had been made. For in this case no release had been made, either upon the record, or otherwise.

By the R. S., c. 90, sec. 14, "when the amount due on a mortgage has been paid to the mortgagee, or person claiming under him, by

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the mortgagor, or the person claiming under him, within three years" from proceedings for a foreclosure, "he may have a bill in equity for the redemption of the mortgaged premises, and compel the mortgagee, or person claiming under him, to release to him all his right and title therein." And, by c. 76, sec. 29, "rights of redeeming real estate mortgaged, may be taken on execution and sold." It was just such a right of redeeming a paid mortgage which Hanson owned, when it was seized on the executions. The same title passed by the sale that would have passed by an extent. The defendant therefore conveyed a good title to the plaintiff; and the latter, having suffered no loss, is not entitled to recover.

Whether, if there had been no right of redemption in existence when the plaintiff purchased of the defendant, he could recover back the consideration paid, on the ground of a mutual mistake of fact, is a question which becomes immaterial. See the case of Earle v. DeWitt, with the able dissenting opinion of Merrick, J., 6 Allen 520.

Exceptions sustained.[3]

Verdict set aside.

[Walton, Dickerson, Barrows and Danforth, JJ., concurred.

Appleton, C. J., and Cutting, J., concurred in sustaining the exceptions on the ground that "the law seems to be well settled in this state, that a mere failure of title furnishes no ground for recovering back money paid as the consideration of a quit-claim deed.]

EDITORIAL NOTE. Since, in some states, payment of a mortgage after forfeiture does not discharge it at law, and since, even where payment discharges the mortgage at law, such discharge rests upon matter in *pais*, leaving the mortgage an encumbrance of record, it is important to consider how the title can be cleared. Normally, the mortgagee is willing to accept payment and execute any discharge that may be demanded; otherwise resort may be had to a suit in equity to redeem. In either case a formal discharge is to be obtained from him, voluntarily or under decree of court, and the question remains what form such discharge should take.

A deed of conveyance, by release, quit claim or otherwise, so executed as to be entitled to record, is sufficient everywhere. In those states where payment discharges the mortgage at law, a written

[3] Accord: Phelps v. Sage, 2 Day (Conn.) 151; Holman v. Bailey, 3 Metc. (Mass.) 55 (semble);

Contra, Griffin v. Lovell, 42 Miss. 402 (statute); McNair v. Picotte, 33 Mo. 57; Swett v. Horn, 1 N. H. 332. And see Shields v. Lozear, 34 N. J. L. 496. See also, Ladue v. D. & M. R. Co., ante.

Compare, Crain v. McGoon, 86 Ill. 431; Maynard v. Hunt, 5 Pick. (Mass.) 240; Rowell v. Mitchell, 68 Maine 21.

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acknowledgement of satisfaction, if entitled to record, would be sufficient. In many of our states the statutes expressly provide for the recording of such an instrument, and in others it might, if attested and acknowledged, be entitled to record as an "instrument affecting the title to real property." Such an instrument would, of course, be but imperfectly effective in those states where payment does not discharge the mortgage at law, unless by statute it is given the effect of a discharge. In many of our states the statutes provide for the discharge of mortgages by an entry of satisfaction in the margin of the record of the mortgage. See further, Jones, §§ 992-1037. In many of the states a penalty is provided for refusal to discharge a mortgage which has been satisfied.

If the mortgage has been assigned without a recorded assignment, or, if, for any reason, the owner of the mortgage is not the record owner, a discharge should, of course, be obtained from the record owner, or, by recorded assignment, the record title to the mortgage should be perfected in the person who does execute the discharge.

KORTRIGHT v. CADY.

COURT OF APPEALS OF NEW YORK, 1860.
21 N. Y. 343.

Appeal from the Supreme Court. Action to foreclose a mortgage. The defendant Cady was a subsequent grantee of the equity of redemption. He averred in his answer, and proved on the trial, that, after the money secured by the mortgage had become due and the stipulated day for payment had passed, he tendered to the plaintiff the amount due for principal and interest. The plaintiff refused to receive it unless Cady would also pay certain taxes upon the mortgaged premises, which the plaintiff had discharged. It was held that Cady was, for reasons unnecessary to be stated, under no obligation to pay the taxes, and the case stood upon the naked tender. Cady did not, in his answer, allege a readiness still to pay the mortgage debt, or that it was paid into court, nor did he offer to bring it into court; and it did not appear, from the finding of facts or otherwise, that he in any way kept the tender good. The plaintiff had the usual judgment of foreclosure, and for a sale of the mortgaged premises. Upon appeal by the defendant Cady, this judgment was affirmed at general term in the first district; whereupon he appealed to this court.

DAVIES, J. [After examining the early English authorities.]

The only question presented for our consideration in this case is, whether a tender of the sum due on a mortgage, after the day ap-

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pointed by it for its payment, extinguishes the lien of the mortgage on the land covered by it. We have seen that by the common law such tender and refusal upon the law day extinguishes the lien of the mortgage, though the debt remains. In this state, the law is well settled that a mortgage is a mere security or pledge of the land covered by it for the money borrowed or owing, and referred to in it, and that the mortgagor remains the owner of the estate mortgaged, and may maintain trespass as against even the mortgagee. (Runyan v. Mersereau, 11 John., 534.) The debt, in the eye of the law, thus becomes the principal, and the landed security merely appurtenant and secondary; and the rights of the parties must be governed by these principles of law applicable to analogous cases. Acceptance of payment of the amount due on a mortgage, at any time before foreclosure, has always been held to discharge the incumbrance on the land; as acceptance of the amount for which personal property was held discharged it from the pledge. Tender and refusal are equivalent to performance. (Kemble v. Wallis, 10 Wend., 374.) This is to be taken with the reservation already stated, that the debt or duty remained, and that the rejected tender, at or after the stipulated time of payment or performance, has the effect only to discharge the party thus making it from all the contingent, consequential or accessory responsibilities and incidents of his contract, but without releasing his prior debt. Coit v. Houston, 3 John. Ca., 243.) In Hunter v. LeConte (6 Cow., 728), the Supreme Court held that a tender of rent takes away the right to distrain till a subsequent demand and refusal; but it does not take away the right to sue for the rent as for a debt. It only saves the interest and costs. And that a tender of rent makes a distress wrongful, though the tender be not made till after the rent day. It will readily be perceived that the principle of this case bears directly upon the question now under consideration; and it is not perceived, if it be sound, why a tender and refusal of the amount due on a mortgage does not extinguish its lien, equally with a tender of rent and refusal, which, as we have seen, extinguishes the right of distress. But a still closer analogy to the present question is presented by the law of tender, as to the lien on goods pledged. Lord Ch. J. Holt, in his opinion in the celebrated case of Coggs v. Bernard (2 Lord Ray., 909), speaking of the fourth class of bailments, says: "If the money for which the goods are pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined." So also Comyn: "By tender of the money, the property in the goods is determined, and the pledge ought to be returned. But if the pawnee refuse to restore the pledge upon tender, trover lies against him." (Comyn's Dig., tit. Mortg., A, and

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cases there cited.) Holding, as we do, therefore, in this State, that the land mortgaged is but a security for the debt due to the mortgagee, in other words, a pledge to him to secure its payment, it is difficult to see why the principles enunciated and well settled in reference to the pledge of personal property do not apply, and why a tender and refusal at any time of the full amount of the debt due does not extinguish the lien of the mortgagee, or pledgee, in the one case as it clearly does in the other. But I think we are not left at liberty to settle this case on principle, but are to regard it as authoritatively disposed of by the courts of this State.

[His honor here reviewed the decisions in New York.] We are bound, therefore, I think, to regard this as the settled law in this State, and are not at liberty to return to the old rule of the common law, which has been shown to be wholly inapplicable to the light in which mortgages are regarded in this State.

It is not perceived how the mortgagee is to be embarrassed, or his security impaired, by the adoption of this rule, as seems to be supposed by the Chancellor in Edwards v. Farmers' Loan Company (26 Wend., 552). If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished. The mortgagee runs no rise in accepting the tender. If it is the full amount due, his mortgage lien is extinguished and his debt is paid. This is all he has a right to demand or expect, and all he can in any contingency obtain. His acceptance of the money tendered, if inadequate and less than the amount actually due, only extinguishes the lien *pro tanto,* and the mortgage remains intact for the residue. A much greater hardship might be imposed, and serious injury be produced, by holding that the mortgagor can not extinguish the lien of the mortgage by a tender of the full amount due. It has never occurred to any judge to argue that a pawnee was in great peril, and in danger of losing the benefit of his pawn, by the enforcement of the well settled rule, that a tender of the amount of the loan and interest, and refusal, extinguished the lien on the pawn. Littleton well says, that it shall be accounted a man's own folly that he refused the money when a lawful tender of it was made to him. The only effect upon the rights of the mortgagee is, that the land or thing pledged is released from the lien, but the debt remaineth.

The only remaining question to be considered is, whether the tender in this case was well made, it not being followed with the allegation of *touts temps prist,* and the money not having been brought into court. It will be seen, by reference to the authorities, that these are not required when the tender has only the effect of extinguishing the lien, and does not operate to discharge the debt or sum owing. In the latter case, the averment of *touts tempt prist,* followed up by bringing the money into court, is essential to a good plea of tender. (Hume v. Peploe, 8 East., 168; Giles v. Hartis, 1 Lord Ray., 254.)

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But if a man make a bond for the payment of a loan of money, and afterwards make a defeasance for the payment of a lesser sum at a day, if the obligor tender the lesser sum at the day, and the obligee refuse it, he shall never have any remedy by law to recover it, because it is no parcel of the sum contained in the obligation. And in this case, in pleading of the tender and refusal, the party shall not be driven to plead that he is yet ready to pay the same, or to render it in court. (Co. Lit., note to sec. 335.) The same principle was held by the Supreme Court of this State in Hunter v. LeConte (6 Cow., 728), and cases there cited.

The judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event.

[Comstock, Ch. J. delivered a concurring opinion quoted from ante, Chap. I.]

Welles, J.: The only question involved in the case is, whether the tender made by the defendant Cady, under the circumstances, was effectual to extricate the premises in question from the lien created by the mortgage of Blunt to Miller. This tender was made after the day provided in the bond and mortgage for the payment of the money, which is called the law day. If the sum tendered was sufficient in amount, and was made to the proper person, the question is reduced to the single point whether the lien of a mortgage is, *ipso facto,* discharged by a tender of the amount due made after the law day; because, if it is, there is no necessity, in an answer setting it up, of the allegation of *tout temps prist,* or of any evidence to show that the tender has been kept good, neither of which is contained in the present case; but the defendant relies solely upon the fact of a tender and refusal as equivalent to payment, for the purpose of extinguishing the lien of the mortgage.

[After examining the decisions in New York.] My own opinion is, after a careful examination of the cases, that the weight of authority is in favor of the rule as it existed at the common law. If that rule has not been abrogated or modified, all will admit that it is the plain duty of the courts to follow and enforce it. Clearly there is no *stare decisis* in our way. It is of importance that the rule be definitely settled, and its boundaries defined. Before we hold a rule different from what we find it settled by the common law, we should require evidence that the rule has been changed by competent authority, either expressly or by necessary implication.

This evidence, the advocates of the change of the rule claim, is found in the changed character of a mortgage upon land, in consequence of various legislative enactments. We are told that when the rule of the common law in question was adopted, a mortgage conveyed a conditional estate in the premises, which entitled the mortgagee to possession, and upon which he could maintain ejectment; and that a mortgage does not now pass any estate in the land, but

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is merely the creation of a specific lien as security for the payment of a debt or the performance of a duty; and that the statute has taken away the right of the mortgagee to maintain ejectment. All this is true; and doubtless other shades of difference may be found between the legal effect of a mortgage at common law and as it now exists. But they will be found to relate to the remedy, or to consist in collateral or incidental circumstances. Mortgages are substantially what they always were. The fact that they are not now regarded as transferring the freehold, but are merely specific liens, is altogether theoretical and ideal, so far as respects the question under consideration. The great object of these instruments is the same now as it always was—that of security for the payment of money or the performance of a duty. A mortgagee in possession is now, as always heretofore, accountable for rents and profits, and he may still defend his possession with the mortgage the same as ever. I know of no difference between the right of the mortgagor, or the person owning the equity of redemption, to redeem the premises from the lien of the mortgage, as that right now exists, and as it existed in the time of Coke or Littleton. That right is governed now by substantially the same rules as then.

The rule contended for by the plaintiff is reasonable, convenient and just. In the first place, the parties to the mortgage have, by agreement, fixed upon the time of payment and if the mortgagor fulfills his agreement by paying on the day appointed, or tendering payment on that day, the lien is discharged. The parties are then to be ready, the mortgagor to pay, and the mortgagee to receive. If the former performs his duty, or tenders performance, and the latter refuses, his lien is gone forever; he has no excuse for his folly, and is entitled to no consideration for the loss of his lien. On the law day, each party is presumed to know exactly what his duty is, and the amount the mortgagor is bound to pay and the mortgagee entitled to receive.

If the mortgagor allows the law day to pass without payment or tender, he then is a defaulter. If he can discharge the lien by a tender of payment the next day, there is no reason why he may not do the same by a tender after the lapse of one year or of ten years.

Suppose the mortgagee goes into possession under the mortgage, by consent of the mortgagor, immediately upon default of payment, and the latter takes no steps towards payment for years after; what amount shall he tender when he gets ready for payment? what abatement from the principal and interest shall be made for mesne profits? Shall the defaulting mortgagor be permitted to select his own time, and then make a tender of such an amount as he shall deem proper, and the mortgagee be bound to accept it in full, at the peril of losing his lien forever?

Suppose again the case of a defaulting mortgagor, who claims to

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have made partial payments, or to be be entitled to a set-off, about which he and the mortgagee in good faith differ: according to the rule claimed by the defendant, he must accept in full the amount tendered at the peril of losing his lien, provided, upon a litigation, it shall be adjudged that the tender was sufficient in amount. It seems to me that the old rule is the only just and wholesome one that can be recognized. It is quite as favorable to the mortgagor as he can in reason ask. If he makes a sufficient tender after the day and before an action is brought to foreclose the mortgage, let him keep the tender good, and, when he is sued, let him set it up as a defense, bring the money into court and offer payment as in other cases, and the court will, in such a case, decree the mortgage satisfied and discharged, and adjudge costs against the plaintiff. Or if for any reason the mortgagor, or the person whose duty or interest it may be to have the lien discharged, does not wish to wait the mortgagee's time for foreclosing, let him make his tender and keep it good, and then bring his action to redeem, alleging the tender and offering to pay; and if, upon the trial, it is found that his tender was sufficient and the plaintiff was ready to pay, the court would give him all the relief which equity and justice required. In all these cases, the mortgagee would have the right to have the disputed questions adjudicated, without losing his lien for the amount in equity and justice due to him.

The rule contended for by the defendant would, in many cases, operate as a bounty to negligent and defaulting debtors, and mortgagees would, under its workings, be induced to purchase their peace at an unjust sacrifice of their rights.

For the foregoing reasons, I am of the opinion that the rule of Littleton, as expounded by Coke, and as, all now admit, was the rule of the common law in relation to the effect of a tender after the law day, is still the law of this State; and as the tender in this case has not been kept good, and the defendant's answer contains no offer of payment, and the facts found by the court before whom the cause was tried do not show that the tender has in any sense been kept good, or that the defendant was ready to pay, &c., I think that he can have no benefit by reason of it; and that the judgment should be affirmed, with costs.

Judgment reversed.[4]

[4] Accord: Caruthers v. Humphrey, 12 Mich. 270. But see, Renard v. Clink, 91 Mich. 1; Proctor v. Robinson, 35 Mich. 284.

Compare, Himmelmann v. Fitzpatrick, 50 Cal. 650; Matthews v. Lindsay, 20 Fla. 962; Hudson Bros. Commission Co. v. Glencoe Sand &c. Co., 140 Mo. 103; Bailey v. Metcalf, 6 N. H. 156; Mankel v. Belscamper, 84 Wis. 218.

Even in New York and Michigan, if the mortgagor seeks affirmative relief in equity to remove the cloud of the encumbrance from his title, he cannot rely upon a tender but must pay the debt. Tuthill v. Morris, 81 N. Y. 94; Cowles v. Marble, 37 Mich. 158.

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JOHNSON, J., in MATTHEWS v. AIKIN, 1 Comst. 595 (Court of Appeals of New York, 1848): It is a general and well established principle of equity, that a surety, or a party who stands in the situation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor whose debt he is compelled to pay, as to any fund, lien, or equity which the creditor had against any other person or property, on account of such debt. The general doctrine, as a rule of equity, is not controverted on the part of the appellants, but is fully conceded. It is insisted, however, by their counsel, that the guarantor in this instance did not become such at the request of the debtor; that as to the debtor, he was a mere volunteer, having no remedy over against him, and never acquiring the character of a surety so as to be entitled to subrogation to the rights and remedies of the creditor.

The objection seems somewhat narrow and technical when addressed to a court of equity whose peculiar province is to mete out substantial justice where the more restricted powers of the common law fail in its administration. But it leads us to examine carefully into the grounds and principles upon which the right of subrogation rests. Does it rest upon the foundation of a contract binding in a court of law between the debtor and his surety? In other words; does it turn substantially upon the question whether or not the surety who has paid the debt to the creditor has a remedy over, on his contract, against the principal debtor for money paid in an action at law? or does it not rest rather upon the broader and deeper foundations of natural justice and moral obligation? Chancellor Kent says, in Hays v. Ward, (4 Johns. Ch. 130,) "This doctrine does not belong merely to the civil law system. It is equally a well settled principle in the English law that a surety will be entitled to every remedy which the principal debtor has, to enforce every security, and to stand in the place of the creditor, and have those securities transferred to him, and to avail himself of those securities against the debtor. This right stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution against another." Lord Brougham, in Hodgson v. Shaw, (3 Mylne & Keene, 183,) said: "The rule here is undoubted, and is founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining his reimbursement. It is scarcely possible to put this right of substitution too high; and the right results more from equity than from contract or quasi contract unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication." Sir Samuel Romilly, in his argument in Craythorne v. Swinburne, (14 Ves. 159,) stated the rule to be, that "a surety will be entitled to every remedy which the creditor has

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against the principal debtor to enforce every security by all means of payment, to stand in the place of the creditor not only through the medium of contract but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor." And this exposition of the rule was fully sanctioned by Lord Eldon in giving judgment in that case.

The equity is certainly as strong, and it seems to me somewhat stronger in favor of substitution, as against the creditor at least, than it is between sureties for contribution where one has paid the whole debt, and it has been likened to the case of contribution between sureties. As between them the rule in equity is clear that the ground of relief does not stand upon any notion of mutual contract express or implied, but arises from principles of equity independent of contract. Story's Eq., sec. 493, and notes, where the authorities are all collected. This is also substantially the rule in courts of law. (Norton v. Coons, 3 Denio, 130.) In that case the circumstances under which the defendant became co-surety were such as to repel the presumption of any promise to make contribution. But the court held that his being a surety on the same contract without qualification in terms was sufficient to fix his obligation to contribute, and that for the purpose of giving the plaintiffs a remedy the court would presume a promise. A promise was therefore imputed where none confessedly existed, in order to provide a remedy for the party where there was no doubt as to the legal liability; and the legal liability in such cases springs from the equitable obligation; the law courts having borrowed their jurisdiction in these particular cases from the courts of equity. In the present case it seems to me, if it were necessary, a court of equity ought to imply a promise on the part of the creditor to subrogate the surety to all his rights and remedies, in case he resorted to the latter for payment of the debt upon his guarantee. The equitable obligation resting upon him to do so seems to me most manifest.

[His honor then proceeded to show that, even if such a defense was open to the original debtor, it was not open to the defendant.]

HEISLER v. ALTMAN & CO.

SUPREME COURT OF MINNESOTA, 1894.
56 Minn. 454.

COLLINS, J.: Stated in chronological order, the controlling facts in this case are as follows: July 28, 1880, defendant corporation

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duly recovered, and caused to be docketed in the office of the clerk of the District Court for Blue Earth county, in this state, a judgment for the sum of $844.09 against one John C. Heisler and another. In March, 1886, said Heisler purchased, and there was duly conveyed to him by warranty deed, a farm in said county, consisting of one hundred and ten acres, subject to a mortgage for the sum of $900; and, for the vendor's interest, Heisler agreed to pay the sum of $1,450, to be evidenced by two promissory notes,—one for $550, and the other for $900. The plaintiff in this action, at the request of said Heisler, who was her son, signed his said note for $550, as a surety, and it was delivered to the vendor of the farm. Heisler also made and delivered to said vendor his note for $900, and, to secure the payment of both notes, executed and delivered a second mortgage on the farm, which was duly recorded. John C. Heisler neglected to pay the note for $550 when it matured, and, upon the commencement of legal proceedings against her to enforce its collection, the plaintiff paid the same. She then paid the note for $900 given to the vendor of the farm, and soon afterwards, December 7, 1887, said John C., his wife joining, executed and delivered a warranty deed, whereby they conveyed the farm to the plaintiff, subject to the mortgage first above mentioned. The deed to said John C. Heisler, and the deed from him and his wife to the plaintiff herein, were recorded simultaneously, on January 3, 1888. The court found that the deed last mentioned was accepted by plaintiff to secure and indemnify her for the amounts so paid by her on said notes, that the value of the farm had never exceeded $2,300, and that no part of the sums paid by plaintiff had been repaid to her. On January 21, 1888, the vendor mortgagee executed and delivered a satisfaction of his mortgage, which was duly recorded; the effect on the title, as shown by the record and docket entries, being to promote defendant's judgment, and to make it a second instead of a third lien on the land. The only superior lien was that of the first mortgage, and, as will be seen, the plaintiff's claim or interest in the farm was thus made of no practical value. At no time prior to this was the plaintiff informed of the existence of the judgment, nor had she caused any examination to be made in the clerk's office as to judgments against her son. January 11, 1890, after this action had been commenced, and defendants had been informed of plaintiff's equities, the farm was sold to one Lamb, by the proper sheriff, under and by virtue of an execution duly issued upon the judgment, and to satisfy the same. The sheriff's certificate of sale was delivered to Lamb, but defendant was the real purchaser, and shortly afterwards the certificate was duly assigned to it. On these findings the court below ordered judgment canceling and annulling the satisfaction of the mortgage and the record of the same, and restoring and reinstating, of record and otherwise, the mortgage lien as of the date of the record, and as

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prior and paramount to the lien or claim of defendant by virtue of the judgment or sale on execution, or otherwise; further, that plaintiff was the equitable assignee and owner of said mortgage, and that as such she be subrogated to the rights of the original mortgagee.

This appeal is from an order denying a new trial.

The doctrine of subrogation has recently been considered by this court in two cases: Emmert v. Thompson, 49 Minn. 386, and Wentworth v. Tubbs, 53 Minn. 388. It was said in the first-mentioned case that this doctrine is enforced solely for the purpose of accomplishing substantial justice, and, being administered upon equitable principles, it is only when an applicant has an equity to invoke, and when innocent persons will not be injured, that a court can interfere. That in this way a court, under a great variety of circumstances, may relieve one who has acted under a justifiable or excusable mistake of fact, is well settled, and that it is a common thing for courts of equity to relieve parties who by mistake have discharged mortgages of record, and to fully protect them from the consequences of their acts, where, as before stated, no injury to innocent parties will result. In the Wentworth Case it was said that the doctrine could only be applied in favor of one who has bought a debt, either expressly, or by paying it under circumstances which render the payment equivalent to a purchase; and this is solely a question of intention, either expressed or presumed from the relation of the party to the debt, or other circumstances under which payment was made. These cases come very near sustaining the conclusion reached by the court below.

The findings are silent as to any express intention of the plaintiff when paying the $550 note. But she was a surety only, entitled, upon payment to the benefit of all securities held by the payee, and under these circumstances the payment was simply equivalent to a purchase. Because of the relations of the parties the presumption arises that plaintiff did not intend to extinguish the debt, or to release the security. Being, by reason of the payment, entitled to the benefit of the mortgage, to the extent of her interest, but subject to the claim of the holder of the second note, the plaintiff was not an intermeddler or a volunteer, when, in order to fully protect and secure herself, she paid the note last mentioned. And under the circumstances this payment must also be regarded equivalent to a purchase. That it was not intended by the parties to extinguish the claim or to release the security is evidenced by the fact that, immediately after this last-mentioned transaction, plaintiff received a deed of the premises from her son and his wife, which, as found by the court, was taken and received for her indemnification and as security.

A party situated as was plaintiff, who has paid money due upon a mortgage, is entitled, for the purpose of effecting substantial jus-

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tice, to be substituted in place of the incumbrancer and to be treated as assignee of the mortgage, and is enabled to hold the same as assignee, notwithstanding the mortgage itself has been canceled. The true principle is that where money due upon a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, as may best serve the purposes of justice and the just intent of the parties. One who has paid money due upon a mortgage of lands to which he had a title that might have been defeated thereby has the right to hold the lands as if the mortgage subsisted, and had been assigned to him. The mortgage may, for his benefit, be considered as still subsisting, though formally discharged of record, in so far as he ought, in justice to hold the property. Sheldon, Subr., §§ 13, 14, and cases cited; Jones, Mortg., §§ 858, 859, 881, and cases.

Upon the payment of the mortgage, plaintiff was entitled to all of the rights of the original mortgagee, and to an assignment of the mortgage. The same was discharged and satisfied in ignorance of the existence of the judgment lien. Having caused it to be satisfied and discharged in ignorance of the existence of the judgment lien, under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake, and give the party who made it the benefit of the equitable right of subrogation. To do so in this case is to prevent manifest injustice and hardship, and no superior intervening equities are interfered with. See Barnes v. Mott, 64 N. Y. 397; Stanton v. Thompson, 49 N. H. 272.

Of course, it has been observed that defendant obtained and docketed the judgment several years before its debtor purchased the real estate in question, and that the mortgage was a prior and paramount lien up to the time of its satisfaction and discharge. Before the sale this action had been commenced, and thereby defendant had been informed of plaintiff's equities. It purchased with full notice. It could not and did not acquire an intervening superior equity through the sheriff's certificate. By subrogating the plaintiff to the rights of the mortgagee, it is not placed in a worse position than it held when the mortgage was alive.

Order affirmed.[5]

ARNOLD v. GREEN.

COURT OF APPEALS OF NEW YORK, 1889.
116 N. Y. 566.

This was an action to compel the specific performance of a contract to convey land.

[5] Compare, Ahern v. Freeman, 46 Minn. 156.

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On the 11th of July, 1879, the defendant entered into an agreement with Isabelle K. Arnold, one of the plaintiffs, whereby he covenanted to convey to her one hundred and ninety acres of land, known as the Arnold homestead, in the town of Mt. Morris, Livingstone county, "subject to all existing liens now on said property," upon the payment by her of the sum of $1,400, with interest thereon payable semi-annually, together with interest on the incumbrances then existing on said farm and the taxes thereon, all of which she duly agreed to pay on her part. The liens existing on the premises at the date of said contract were (1), a mortgage dated April 17, 1877, given by Russell G. Arnold to William A. Wadsworth to secure the payment of $6,000, in three years with semi-annual interest, no part of which had been paid when this action was commenced, except the interest up to April 2, 1883; and (2), a decree in the Surrogate's Court of said county for the payment of the debts of Ashbel Arnold, deceased, a former owner of said land, amounting to the sum of $527.47 with interest from February 21, 1881. This decree was a charge upon the land subsequent to the Wadsworth mortgage, but prior to the interest of the defendant, who at the date of said contract was the owner of the equity of redemption. An appeal had been taken from said decree and was pending at the time of the trial. The plaintiff, Susie K. Arnold subsequently, by assignment, acquired an interest in said land contract upon which there is still unpaid the whole of the principal, besides interest from May 10, 1883. The plaintiffs have been in the possession of the premises since the date of the contract. On Saturday, December 9, 1883, the defendant demanded of the plaintiffs payment of the interest due on the contract, and was told that it would be paid by the middle of the following week. He gave them until the next Saturday. They also informed him that they would get the money and pay him and that they should want a deed, to which he made no reply. On Monday, December eleventh, they told him that they would be ready at eleven o'clock to pay him and take a deed, and he said that he would be at home at that hour, but before it arrived he left Mt. Morris, where he resided, and went to the residence of said Wadsworth, at Geneseo, and proposed to pay said mortgage and take an assignment of it. Mr. Wadsworth refused to assign, whereupon the defendant paid him the amount of the mortgage, $6,231.50, and received a discharge of the same which he placed upon record. In the afternoon of the same day the plaintiffs offered to pay defendant the sum unpaid on the contract and requested him to give them a deed, but he refused. He, however, offered to sell the farm to the plaintiff, Isabelle, for the amount of the incumbrances thereon, provided she would "pay up to six or seven thousand dollars," and to give a deed and take a mortgage payable in six years. Said Wadsworth held the mortgage as an investment and had not called for the

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principal, and did not wish that it should be paid, but he had stated to the defendant that unless payments were promptly made he should proceed to collection. On several occasions the defendant had spoken to the agent of Mr. Wadsworth about unpaid interest, and had informed him that he wanted it kept up because he had some interest in it. On December 29, 1883, the plaintiffs made a formal tender and demand, but the defendant again refused and thereupon they brought this action to compel a specific performance.

The defendant by his answer claimed that he was the equitable owner of the Wadsworth mortgage and asked that it be adjudged a valid and subsisting lien upon the premises.

The trial court, after finding the facts substantially as stated, found as a conclusion of law that said facts constituted no defense or counter-claim to the plaintiffs' cause of action, and ordered judgment for specific performance and for conveyance by the defendant, "subject to all liens existing upon said property on the eleventh of July, 1879, upon being paid the sum of $1,400, and interest thereon from May 10, 1883." Judgment having been entered accordingly, the defendant appealed to the General Term, which modified the decree by inserting therein, after "July, 1879," the following provision: "And particularly to the lien of the Wadsworth mortgage so-called, being a mortgage to secure the payment of the sum of $6,000, and interest thereon from April 21, 1883; that said George A. Green be declared subrogated to the rights of the mortgagee in said mortgage at the time of its payment and discharge, with the right to enforce the payment of the principal and interest due and unpaid thereon; and that the discharge of said mortgage, made by Wadsworth, the mortgagee, and recorded in the office of the clerk of the county of Livingston, be by said clerk canceled of record; that the defendant, on the plaintiffs' election at any time within three months after entering this judgment, or the final determination of any appeal taken in this action, on payment to him of the amount secured to him by said bond and mortgage as reinstated, be required to assign to such person or persons as the plaintiffs may direct all rights and interests taken by him under said Wadsworth bond and mortgage as reinstated, and that the plaintiffs have the same time in which to pay and satisfy said mortgage if they elect to pay the same."

VANN, J.: This appeal presents the single question whether, under all the circumstances of the case, the defendant should have been substituted in the place of Mr. Wadsworth as the owner of the mortgage in question. Did he by the fact of payment become the equitable assignee of the security and entitle to enforce it for his own reimbursement and the protection of his interest in the land? Under some circumstances the payment of a mortgage does not satisfy it or destroy its lien, because equity regards the person making the payment as the owner thereof for certain definite purposes and keep

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it alive and preserves its lien for his benefit and security. According to the well-established principles upon which the doctrine of equitable assignment by subrogation rests, if the person paying stands in such a relation to the premises that his interest, whether legal or equitable, can not otherwise be adequately protected, the transaction will be treated in equity as an assignment. (Sheldon on Subrogation, §§ 1, 3, 14, 16; 3 Pomeroy's Equity Jur., § 1211; Jones on Mortgages, § 874.) The remedy of subrogation is no longer limited to sureties and *quasi* sureties, but includes so wide a range of subjects that it has been called the "mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it." (Harris on Subrogation, § 1; Barnes v. Mott, 64 N. Y. 397, 401; Stevens v. Goodenough, 26 Vt. 676; Harusberger v. Yancey, 33 Gratt. 527; Smith v. Cosam, 42 Conn. 244.) While a mere volunteer, with no obligation to pay or interest to protect, is not entitled to its aid, it is frequently applied in favor of a vendee of encumbered real estate, who, although not personally liable, has paid the debt of another which is a charge upon the land, and which, if not paid, might cause him to lose his interest therein. Under such circumstances the debt, although paid and satisfied in form, is regarded in equity as neither paid nor satisfied in fact, but by operation of law the former holder ceases to be the creditor, while the person paying takes his place as owner of the debt and security unimpaired. Where, within the limitations suggested, benefit may result to the person paying without injury to the person who should pay, equity casts the burden upon the latter, who ought in fairness to bear it, provided it will not work injustice or disturb the rights of other creditors of a common debtor. (Id.; Johnson v. Zink, 51 N. Y. 333; Cole v. Malcolm, 66 id. 363; Twombly v. Cassidy, 82 id. 155; Gans v. Thieme, 93 Id. 225, 232; Averill v. Taylor, 8 id. 44, 51.)

These principles, when applied to the facts of this case, sustain the judgment as modified by the General Term. The defendant was the purchaser of land subject to two incumbrances, the earlier of which was a mortgage for a large sum past due, and the other a decree in Surrogate's Court, the subject of which was still in litigation. He was the vendor of the same land, subject to the same incumbrances, but no part of the principal of the purchase-price had been paid, and interest thereon was past due and unpaid. The land itself was the primary fund for the payment of said incumbrances, neither of which was the personal debt of the defendant, but either of which, if enforced, would require him to raise the money and pay it, or else lose his interest in the premises. He held the legal title to the land as security for the payment of the purchase-price, and as trustee for the plaintiffs, the equitable owners. It did not appear that the land was adequate security for the amount there

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was against it, including the demand of the defendant. It is clear, therefore, that he was not a mere volunteer or stranger, because he has an actual interest to protect against two prior liens, either of which might be enforced at any time, involving trouble, expense and the possible loss of his claim. The danger of interference may have been remote, but there was nothing to protect him against a change of mind on the part of the holder of the mortgage or on the part of the plaintiffs. Freedom from interference depended upon moral assurance, not upon legal right. How can he be called a stranger to a debt whose land is the primary fund for the payment of such debt? A stranger or volunteer, as those terms are used with reference to the subject of subrogation, is one who, in no event resulting from the existing state of affairs, can become liable for the debt, and whose property is not charged with the payment thereof and can not be sold therefor. A payment made by one who was liable to be compelled to make it, or lose his property, will not be regarded as made by a stranger. Where the person paying has an interest to protect he is not a stranger. Even if he holds the title to land merely as security, still he has an interest that is insecure, in a legal sense, as long as the prior lien is past due and held by another. (Harris on Subrogation, §§ 795-798; Sheldon on Subrogation, §§ 245, 246; Jones on Mortgages, § 877.)

It is insisted, however, that the payment made by the defendant was not a fair effort to protect his property, but that his method was underhanded and his object uncertain. This is doubtless true, and it gave the court jurisdiction to require the defendant to so handle his security as not to injure the plaintiffs, and to place them as nearly as possible in the same position as if he had not paid the mortgage. Owing to his misconduct he was properly compelled not only to defer the enforcement of his security until the plaintiffs had had a reasonable time to find another holder for the mortgage, but also to pay the entire costs of the litigation. The plaintiffs can not, with propriety, complain of the decree as modified, because they lose nothing by it. They are substantially situated as they were before the payment was made. They should not, therefore, be permitted to take advantage of the defendant by insisting that an effect be given to the payment which was not intended and which would be inequitable. They come into a court of equity seeking, among other things, relief from their own default in not paying the interest upon the law day. (Stevenson v. Maxwell, 2 N. Y. 40.) As they seek equity from the defendant, they must do equity toward him; and when they receive all that they contracted for, it would not be equitable for them to avoid paying for it as they agreed. Equity will not permit them to receive the equivalent of $6,000 for nothing and at the same time to demand its aid for further relief against the person who parted with that sum for their benefit, even if his methods were

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indirect and his object questionable. On the other hand, it will give to each party his own; to the plaintiffs the land, and to the defendant the money and security, but, under the circumstances, will require him to so use the latter as not to take any advantage of his vendees.

If the plaintiffs had made a tender before the defendant made the payment, or if they could not have been placed in the same situation, substantially, that they were in before the payment was made, different questions would have arisen for consideration in relation to which we express no opinion.

We think that the judgment should be affirmed, but, under the circumstances, without costs.

Judgment affirmed.[6]

GOODYEAR v. GOODYEAR.

SUPREME COURT OF IOWA, 1887.
72 Iowa 329.

ROTHROCK, J.: The material facts in the case are as follows: On the 19th day of June, 1882, R. G. Barnes sold and conveyed the land in controversy to E. C. Goodyear. The consideration for the sale was $1,600. On this sum $250 was paid in cash, and the balance was secured by a mortgage on the premises, executed by E. C. Goodyear. The deed and mortgage were filed for record and recorded. On the 7th day of October, 1882, the defendants Charles P. Kellogg & Co. obtained a judgment against said E. C. Goodyear and Henry Goodyear in the circuit court of Greene county for the sum of $1,760. This judgment was a lien on the land, but junior and inferior to the purchase-money mortgage. On the 17th day of November, 1882, E. C. Goodyear and her said husband conveyed the land to Martin Goodyear by a special warranty deed, and by the terms of the deed Martin Goodyear assumed the payment of the mortgage to Barnes, and agreed to pay the same when it became due. About January 16, 1884, Martin Goodyear paid the Barnes mortgage in full, and Barnes executed a release and satisfaction of the mortgage, which was filed for record and recorded on the 30th day of January, 1884. On the 26th day of December, 1884, Martin Goodyear conveyed the land by general warranty deed to Elizabeth Goodyear. Martin Goodyear is a son, and Elizabeth Goodyear a daughter, of E. C. and Henry Goodyear. Martin Goodyear and

[6] Compare, Downer v. Fox, 20 Vt. 388; Flachs v. Kelly, 30 Ill. 462; Weld v. Sabin, 20 N. H. 533; Aultman & Co. v. Seichting, 126 Ind. 137; Fiacre v. Chapman, 32 N. J. Eq. 463.

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Elizabeth Goodyear, at the time the respective conveyances of the land were made, had no actual knowledge of the judgment in favor of Kellogg & Co.

The question in the case arising upon the foregoing facts is, has Elizabeth Goodyear, the present owner of the land, the right to interpose the mortgage as a lien superior to the judgment? It is claimed that she has such a right, because her grantor assumed and paid the mortgage as part of the purchase-price of the land, and that he was entitled to be subrogated to the rights of Barnes, the mortgagee. We think this is a misconception of the law of subrogation, and a mistake as to the relations of the parties to the mortgage in question. Martin Goodyear and Elizabeth Goodyear were, at the time of their respective purchases of the land, charged with constructive notice of the judgment. This notice was as effectual, as to them, as actual notice would have been. They can assert no equity arising out of the fact that they had no actual knowledge of the existence of the judgment. If they could do so, constructive notice would be of little avail. When Martin Goodyear took his conveyance of the land, he agreed to pay the mortgage. He did not become the surety of the mortgagor. He made the debt his own. In other words, he stepped into the shoes of the grantor. He actually paid the mortgage, and had it released and satisfied of record. In our opinion, neither he nor his grantee has any greater right to revive it and use it as a lien superior to the judgment than his grantor would have if he had paid it, and was still the owner of the land.

The doctrine of once a mortgage always a mortgage has no application to the facts of this case. If Barnes had taken a conveyance of the land, and used his mortgage as payment in part of the purchase-money, it is well settled that he could have set up the mortgage as against the judgment. But that is altogether a different question from the mortgagor or his grantees attempting to do so. They have no right in equity, because, they do not succeed to any of the rights of the mortgagee by equitable assignment or otherwise. What the rights of Martin Goodyear would have been if he had taken an assignment of the mortgage, we need not determine. His obligation was to pay it, and he performed that obligation, and the mortgage was satisfied.

We think the decree of the district court must be reversed.[7]

[7]Accord: Birke v. Abbott, 103 Ind. 1.

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WILKINS ET AL. v. GIBSON.

SUPREME COURT OF GEORGIA, 1901.
113 Ga. 31.

[On October 30, 1893, Mrs. Wilhelmina I. Steiner executed and delivered to John P. Gibson a security deed to a certain described tract of land, to secure a debt of $6,000 due the grantee, who gave to the grantor a bond conditioned to reconvey the property upon payment of the debt. This deed was duly recorded on November 28, 1893. The debt became due on account of the same not having been paid in accordance with the contract, and Gibson filed his petition against R. C. Neely, administrator of the estate of Wilhelmina I. Steiner, who had died since the execution of the deed, to recover judgment on the notes which the deed was given to secure. Having recovered such a judgment, which was declared to be a special lien on the land, execution was issued thereon on May 28, 1896, and the same having been levied on the land described in the security deed, a claim was interposed to the property by Wilkins, Neely & Jones. Pending the trial of the claim case, on September 14, 1897, Gibson, the plaintiff in execution, filed an equitable petition against Wilkins, Neely & Jones, the claimants and R. C. Neely, as administrator of the estate of W. I. Steiner, deceased, alleging that on February 23, 1889, Wilhelmina I. Steiner executed and delivered to A. L. Richardson a security deed, conveying a certain described tract of land; that on November 19, 1890, W. I. Steiner executed to Wilkins, Neely & Jones a mortgage deed covering the property described in the deed to Richardson; that subsequently, the notes given by W. I. Steiner to A. L. Richardson having become due, she applied to Lawson & Scales, loan brokers, and engaged said firm to negotiate a new loan in order that she might pay up and discharge her indebtedness to Richardson, who was urging a settlement of the same; that application was made for a loan of $6,000, the same being sufficient to pay the debt due Richardson, which amount was advanced by petitioner to W. I. Steiner; that of the sum of $6,000 loaned by petitioner to Mrs. Steiner in 1893, $5,598 was paid by petitioner to Richardson on the notes he held against Mrs. Steiner; that Richardson's deed was canceled and satisfied on the record; that this payment was made at the request of Mrs. Steiner, and her purpose in procuring the loan was to pay the notes held by Richardson; that Wilkins, Neely & Jones did not furnish any credit to Mrs. Steiner by reason of the fact that the Richardson deed was cancelled of record; that their status as creditors was not changed by reason of the cancellation; that the debt for which they claim to hold the deed as security was contracted prior to the cancellation of the Richardson deed, for which reason

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they have in law and equity no right to the land as against petitioner's judgment. Plaintiff prays, therefore, that the land be declared subject to his *fi. fa.* for the amount he paid to Richardson, in the event it is not declared subject to the *fi. fa.* as it now stands, which plaintiff claims as his legal right.

Defendants Wilkins, Neely and Jones demurred to the petition for want of equity. The demurrer was overruled, to which defendants excepted *pendente lite.* Subject to their demurrer defendants answered that they advanced various sums to Mrs. Steiner to be applied upon the debt due Richardson, both before and after the date of their security executed on November 19, 1890, and they pray that they may be subrogated to the rights of Richardson to the extent of the sums so advanced.

The claim case and the equitable proceeding were by direction of the court consolidated and tried together. The trial resulted in a verdict for the plaintiff against the land for $5,598.00, with interest at 7 per cent. from October 30, 1893. Three questions were submitted to the jury by the court: * * * (3) Whether Gibson was subrogated to the rights of Richardson, on the theory that he had paid the money with the understanding that he was to have a first lien on the property. The jury found in favor of Gibson on his claim of subrogation. The defendants' motion for a new trial assigns error upon the admission of certain evidence, upon various specified portions of the charge, and upon the failure of the court to give in charge various requests. The motion was overruled, and they excepted, assigning as error the overruling of the motion and the rulings complained of in their exceptions *pendente lite.*]

COBB, J. [After making a statement of facts which is condensed above.]

The doctrine of subrogation has for a long time been applied by courts of equity. It was borrowed from the civil law, and was of two kinds: the legal subrogation, which took place as a matter of equity without any agreement to that effect made with the person paying the debt; and the "conventional subrogation," which was applied where an agreement was made with the person paying the debt that he would be subrogated to the rights and remedies of the original creditor. See Howe's Studies in Civil Law, 155. Courts of equity in this country have applied the doctrine in favor of sureties who pay off the debts of their principals (24 Am. & Eng. Enc. L. (1st ed.) 194; Sheldon, Sub. (2d ed.), § 86; Harris, Sub., § 162); as well as in favor of any person having an interest in property upon which there is a lien, and who, to protect that interest, pays off such lien. 24 Am. & Eng. Enc. L. (1st ed.) 248; Sheldon, Sub. (2d ed.), § 3; Harris, Sub., § 795. The extent to which the doctrine of subrogation has been expressly recognized by the lawmaking power in this State may be seen by reference to the following sections of

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the Civil Code: 2986, 2995, 2996, 5433, 5471. The doctrine has also, from the very first, been applied in favor of a person who, though having no interest in the property necessary to be protected, yet pays off the lien upon an agreement that he is to be subrogated to the rights of the lienholder. 24 Am. & Eng. Enc. L. (1st ed.) 290, and cases cited; Sheldon, Sub. (2d ed.), § 248. According to these authorities, this agreement may be made with the person paying the debt by either the creditor or the debtor. See also, in this connection, Allen v. Caylor (Ala.), 24 So. 512. The doctrine has been recently applied by this court in such a case. Merchants Bank v. Tillman, 106 Ga. 55. It is, however, never applied for the benefit of a mere volunteer. "The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own." Sheldon, Sub., § 240.

In a case where a stranger pays off the debt of another which is secured by deed or mortgage, the parties have a right to agree that the prayer will have the same priority as the holder of the security, and be substituted for him. A court of equity will enforce this agreement as made, and give the second creditor just such security as he contracts for. If he is content to take an inferior lien and rely on that to enforce payment of his debt, the court will not, in the absence of an agreement for subrogation, come to his relief and subrogate him to the rights of the holder of the original security. Consequently, if the second creditor pays the debt without taking an assignment of the security, and without any agreement, either actual or implied, that the security is to be kept alive for his benefit, and takes a new security, it will be subject to any valid intervening liens which may have been created by the debtor on the property, notwithstanding the former might have paid the debt by request of the debtor and without any knowledge of the existence of the intervening liens. If in such a case the lender desires to be subrogated to the rights of the original creditor, he must make a distinct agreement to that effect. The law will not imply an agreement from the bare fact that the money was paid by request of the debtor. When the first security is paid off its lien is discharged, and the equitable doctrine of subrogation can not be invoked to revive it in favor of a person who had no interest in paying the debt, and who did so without any agreement that he would be substituted for the original creditor. By operation of law, as soon as this lien is discharged, the lien next in dignity takes its place, and for equity to give another creditor priority over such a lienholder, when perhaps the debtor's purpose in discharging the first lien was to give him the preference, would be manifestly unjust. In any case the burden is

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on the person paying off the lien to show an agreement, or a state of facts from which an agreement would be implied, to substitute him for the original creditor. * * *

But it must not be understood that an agreement for subrogation will never be implied. In fact, there are loose expressions in some of the cases to the effect that if the advance is made at the request of on who has an interest in the lien to be discharged, an agreement for subrogation will be implied. See 24 Am. & Eng. Enc. L. 295-296. But in many of the cases where these expressions occur the facts showed an actual agreement, and those few which can be properly treated as deciding the question are out of harmony with the weight of authority. As an instance of the former class, see Sutton v. Sutton, 26 S. C. 33; Home Savings Bank v. Bierstadt, 168 Ill. 618. In Railroad Co. v. Wortendyke, 27 N. J. Eq. 658, certain persons, who had advanced money to pay off a debt contracted by the railroad company for rolling-stock and locomotives, claimed to be subrogated to the rights of the vendors, to the extent of the advancements made. In dealing with this contention, Mr. Justice Green said: "The case as here presented does not entitle the petitioners to a decree for subrogation. They do not, in their petition, claim to stand as guarantors on the contract, or that they were in any way held bound for its performance. They only allege that they made the advances with the understanding that they should be subrogated to the right of the owners of the rolling-stock, to the extent of such advancements. I have been unable to find, either in the petition or evidence, anything to show an agreement with the original debtor or creditor, that these parties should be entitled to subrogation or to stand in the place of the vendors of the stock. It is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditor. Conventional subrogation can only result from an express agreement either with the debtor or creditor." Citing Dixon, Sub. 1, 10, 167; Bouvier's Law Dict., title Subrogation; Sandford v. McLean, 3 Paige, 116; Shinn v. Budd, 1 McCarter, 234. In Watson v. Wilcox, 39 Wis. 643, it was held: One who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and cancelling the mortgage, taking a new mortgage for his own security, can not have the former mortgage revived and himself subrogated to the rights of the mortgagee therein." In Home Savings Bank v. Bierstadt, supra, notwithstanding it was ruled, as stated above, that one who advanced money at the request of the debtor was not to be regarded as a volunteer, it appeared that there was an express agreement that the lender was to have a first lien on the property; and it was said in the opinion that "It is the agreement that the security shall be kept alive for the benefit of the person making the payment which gives

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the right of subrogation, because it takes away the character of a mere volunteer. Here the agreement between the debtor and the appellee, who advanced the money, was to the effect that appellee was to advance sufficient money to discharge the seven Goudy deeds of trust, and should receive from the debtor, by way of security for the money so advanced, a first mortgage upon the seven lots. In equity, that was an agreement that the Goudy deeds of trust should become security for her loan. That was the substance of the transaction, and equity will effectuate the real intention of the parties, where no injury is done to an innocent party, by applying the principle of conventional subrogation." Probably, therefore, the language in another portion of the opinion with reference to money advanced by request is to be treated as qualified by the first part of the foregoing quotation. It was further ruled in that case, that even where the security paid off was cancelled, equity would keep it alive for the benefit of the person paying the debt, provided he was not guilty of gross negligence, and where justice requires it. The Supreme Court of Texas has held that while an agreement for subrogation was necessary, it was sufficiently shown by a recital in a deed to the lender that he retained a first lien on the property. Mustain v. Stokes, 38 S. W. 758.

A case which, perhaps, leans too far the other way is that of Bohn Sash Co. v. Case, 60 N. W. 576. There it appeared that the lender, by express request and solicitation of the debtor, advanced him the money with which to pay off certain mortgages on his property, upon the assurance by the debtor that the lender was to have a first mortgage thereon. There were other liens outstanding at the time, junior to the mortgages, but the lender was assured that these liens had been provided for. As a matter of fact they had not; and the Supreme Court of Nebraska held that the lender was not subrogated to the rights of the mortgagees in the discharged mortgages. In Kocher v. Kocher (N. J.), 39 Atl. 536, it was held that, "Where a son loaned his father money with which to pay assessments which were a lien on a lot, he was not entitled to be subrogated to such lien." In the opinion the vice-chancellor said: "The right of subrogation must either arise out of the circumstance that the party paying or asking subrogation was interested in the property, and entitled to pay the incumbrance in order to protect himself, or he must have made the payment at the request of either the debtor or the lienor, with the understanding that he should be subrogated." In Whiteselle v. Loan Agency (Tex.), 27 S. W. 300, it was held, in effect, that subrogation arose in favor of a lender who advanced money to pay off a security under an agreement with the debtor that he was to have a first lien on the property pledged to secure the original debt.

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It is true, as stated above, that some of the courts have extended the doctrine farther than those above referred to. It has been said that subrogation was a "benevolent" doctrine and equity would apply it in any case in which justice required it; and under sanction of this elastic expression cases can be found where it was applied without the semblance of an agreement. We think the safer and better rule to be, and we therefore hold, that subrogation will arise only in those cases where the party claiming it, advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor. See Aetna Insurance Co. v. Middleport, 124 U. S. 534.

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Some of the extracts from the judge's charge were not in harmony with the rules above laid down, and consequently a reversal of the judgment refusing a new trial is necessary. As the case goes back for another hearing, it would not be profitable, if indeed it would be proper, to express any opinion on the evidence found in the present record, as facts may be adduced on another trial which will give the case an entirely different aspect. Nor is it necessary to set out at length the portions of the charge which contain erroneous statements of the law. They will sufficiently appear from an application to the charge of the principles above laid down. The judge instructed the jury, in effect, that if the plaintiff advanced the money to pay off the debt due Richardson, by request of Mrs. Steiner, and the money was used for that purpose, this, without more, would make a case for the application of the doctrine of conventional subrogation. In order to recover on this theory, the plaintiff must show a state of facts from which either an express agreement or one arising by necessary implication will appear to have been made between him and Mrs. Steiner, or Richardson, or their respective agents under authority from their principals, that the plaintiff was, so far as the dignity of his lien was concerned, to stand in the place of Richardson. It also results from the above that the amendment offered by the plaintiff claiming subrogation was subject to the demurrer filed thereto, for the reason that it is nowhere alleged therein that the plaintiff had an agreement of any character with Mrs. Steiner, or Richardson, whereby he was to be substituted to the latter's rights.[8]

2. The defendants, however, contend that even if the evidence justified a finding that an agreement was made between Mrs. Steiner and Gibson that he was to be subrogated to the rights of Richard-

[8]Compare, Receivers of New Jersey Midland R. Co. v. Wortendyke, 27 N. J. Eq. 658; Tradesmen's Building Assn v. Thompson, 32 N. J. Eq. 133; Bigelow v. Scott, 135 Ala. 236; Wooster v. Cavender, 54 Ark. 153.

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son, it would be inequitable and unjust to apply the doctrine in favor of Gibson, because he was guilty of inexcusable negligence; and the court was requested to charge that Gibson would not be entitled to subrogation if he was guilty of "inexcusable negligence" in failing to know or to act on his knowledge of the deed to Wilkins, Neely & Jones. It is undoubtedly true that if, on account of the gross negligence of the lender, the rights of intervening lienholders are prejudiced, and they are placed in a worse position than they would have been had the debt not been paid, the lender will not be entitled to subrogation. When the defendants, the holders of the intervening liens, took their mortgages, the lien of Richardson was in existence and superior to theirs, and of this fact they had knowledge. To substitute Gibson for Richardson would apparently place them in no worse position than they were before. Wilkins, Neely & Jones claim, however, as will hereafter appear, that they will be substantially and seriously injured if Gibson is permitted to assert the lien of Richardson against them. The fact that Gibson may have known of the existence of the mortgages of defendants, which were executed before the cancellation of the deed to Richardson, will not defeat his right to subrogation, provided, of course, he had an agreement for subrogation. If he had such an agreement, he simply stands in equity in the place of Richardson, so far as the dignity of his debt is concerned. On account of this agreement equity simply assigns this security to him. See, in this connection, Home Savings Bank v. Bierstadt, 168 Ill. 618; Levy v. Martin, 48 Wis. 206-207; Hammond v. Barker, 61 N. H. 53; Campbell v. Trotter, 100 Ill. 281; Tryell v. Ward, 102 Ill. 29. In Bruse v. Nelson, 35 Iowa, 157, it was held that subrogation would arise provided the lender had no actual notice of the intervening lien, though it was of record. In Union Mortgage Co. v. Peters, 72 Miss. 1059, it was held that a second mortgagee, being placed in no worse position by the transaction, can not complain of the subrogation of the lender to the rights of the first mortgagee. See, also, Draper v. Ashley, 104 Mich. 527. The point urged by the defendants against Gibson in this connection is, in its essence, that of equitable estoppel to claim subrogation, because the original lien was cancelled through the negligence of Gibson in failing to take an assignment when the defendants' liens were outstanding. "Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or remedy." 2 Pom. Eq. Jur., § 804. See, also, Whiteselle v. Tex. Loan Agency, 27 S. W. 309, 315, where estoppel was invoked and

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denied by the court in a case similar to the one now in hand. While Wilkins, Neely & Jones do not claim to have advanced any money relying upon the fact that the Richardson deed had been cancelled, nor that they have expressly released any security on this account, still they say that, treating the Richardson deed as having been cancelled, they did not press their claim against Mrs. Steiner with the same vigor that they would have done if they had known their claim was to be treated as inferior to Gibson's, and that they would not have granted Mrs. Steiner the indulgences which they did grant if they had not felt confident of having a first lien on the property; and that these facts would work an estoppel against Gibson to assert the right of subrogation. When a prior incumbrance has been cancelled of record, and, acting on the faith of this, an intervening incumbrancer has delayed in prosecuting his legal remedies or has granted indulgences the result of which is to make the exercise of the right operate to his serious disadvantage, while there may be no estoppel by reason of these facts against the right of a person advancing money to pay off the prior incumbrance to claim subrogation, still if he delays for an unreasonable length of time to claim the right and have the cancellation set aside, this will be a sufficient reason for a court of equity to refuse the right of subrogation.[9]

3. It appears from the record that Gibson, the plaintiff, did not advance the entire amount necessary to satisfy the debt due Richardson, but that the defendants, Wilkins, Neely & Jones, paid a portion of the same. A portion of the aggregate amount paid by them was advanced after the date of their security deed of November 19, 1890, and a portion before, which they claim was paid at the instance and request of Mrs. Steiner. They claim, therefore, to be subrogated to the rights of Richardson to the extent of the sum so advanced. It is well settled that if a senior mortgage be paid off by a junior mortgagee, he will, if the payment was necessary for his protection be subrogated to the rights of the senior incumbrancer. In such a case, however, it must appear that the discharged mortgage was due and was about to be enforced against the property, and that its enforcement would prejudice the claims of the junior lienholders. Sheldon, Sub. (2d ed.), §§ 12, 18; Harris, Sub., §§ 8, 94; 24 Am. & Eng. Enc. L. (1st ed.) 269 et seq. In order, however, to entitle the junior mortgagee to subrogation, the general rule is that the whole debt must be paid and the senior creditor satisfied. Equity will not generally permit a junior incumbrancer to interfere with a senior lien so long as the lien creditor remains unsatisfied. In Carter v. Neal, 24 Ga. 346, it was held: "To entitle one creditor to be subrogated to the rights of another creditor, the former must have satisfied the latter his demand so as to relieve him

[9] Compare, Cobb v. Dyer, 69 Maine 494; Fort Dodge Bldg. & Loan Assn. v. Scott, 86 Iowa 431.

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from trouble, expense and risk." See, also, 24 Am. & Eng. Enc. L. (1st ed.) 200, 255, (2) 273; Harris, Sub. §§ 28, 29; Sheldon, Sub., § 70. It seems, however, that if the debt be actually discharged, the junior incumbrancer would be entitled to subrogation to the extent of the amount he contributed, though the balance of the debt was paid by the debtor or by a third person. In Comins v. Culver, 35 N. J. Eq. 94, it appeared that a judgment was recovered against Hetfield & Culver. From this judgment an appeal was taken, and one Pottle became surety on the appeal bond. The judgment was affirmed. On it a portion of the debt was realized, and Pottle paid the balance. It was held that he was subrogated *pro tanto* to the right of the judgment creditor. See, also, Vert v. Voss, 74 Ind. 566. In Magee v. Leggett, 48 Miss. 139, 146, it was said: "We do not understand the rule as requiring that the 'surety' must make entire payment; it is enough if the creditor has been fully paid, part by the principal debtor, and part by the surety. In such a case, subrogation will accrue *pro tanto* to the extent of his payment." We see no good reason why the same rule would not be applicable in the case of a junior mortgagee who, together with the debtor, pays off a prior lien on the property. It results from this that if Wilkins, Neely & Jones contributed a portion of the amount which went to discharge the debt due Richardson, and this amount was advanced for the purpose of protecting their security and rendering it more effectual, they would, after Richardson had ben paid in full, be subrogated equally with Gibson, if it develops that he is in fact entitled to subrogation, to the extent of the amount so advanced; and in case the full amount of both claims is not realized upon an enforcement of the Richardson security, the defendants would be entitled to prorate the sum actually realized with the claim of Gibson. As to the sums advanced prior to the date of their security, they of course would have no claim for subrogation on the theory that they paid for their protection; but if they are entitled to subrogation at all as to these sums, it must be governed by the principles of conventional subrogation, above laid down.[10]

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Let the case be tried again in the light of the views above expressed.

Judgment reversed. All concurring.

EDITORAL NOTE.

CHANGES IN THE FORM OF THE DEBT. JUDGMENT ON THE DEBT.

When the holder of a mortgage takes a new note or other evidence of indebtedness in place of that originally secured by the mort-

[10] Compare, Cason v. Connor, 83 Tex. 26; Magilton v. Holbert, 52 Hun (N. Y.) 444.

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gage, the question arises whether the mortgage is discharged or stands as security for the new note, etc. The question is ultimately one of payment. Although, for most purposes, a negotiable instrument, and, for many purposes, a common-law specialty such as a bond, is regarded as an embodiment of the right of action represented by it, not as mere evidence of an intangible right, yet, in this situation, it is said that equity, regarding the substance of things, considers the debt as the thing actually intended to be secured, and the note, etc., as mere evidence of the debt. Accordingly, it is usually held that the substitution of a new note is merely a change in the form or evidence of the debt, not a payment thereof, unless a contrary intention appears; Bonestell v. Bowie, 128 Cal. 511; Port v. Robbins, 35 Iowa 208; Flower v. Elwood, 66 Ill. 438; Lippold v. Held, 58 Mo. 213; Brinckerhoff v. Lansing, 4 Johns. Ch. 65; although in a few jurisdictions it is held that payment is presumed *prima facie* from the acceptance of a negotiable instrument. See Fowler v. Bush, 21 Pick. (Mass.) 230. Not only is there this disagreement as to the presumption which governs in the absence of evidence of intent, but the cases are not harmonious as to the evidentiary effect of various features of such transactions, such as a change in the parties to the note, in the amount payable, or in other terms thereof. See Jones, §§ 924-935. While the intention need not be expressed but may be inferred from all the circumstances of the case, an express agreement is of course controlling. It is therefore best to incorporate in a renewal note a recital to the effect that it is a renewal of the original note, describing it, and that the mortgage securing the latter is to stand as security for the renewal. Thus safeguarded, a renewal of the note, under the original mortgage, is preferable to the taking of a new mortgage, as the latter course is likely to let in intervening encumbrances. Under such circumstances equity has sometimes kept alive the original mortgage, on principles analogous to those of subrogation, but such relief is by no means assured as against the intervening encumbrancer, and is impossible as against a subsequent purchaser under the intervening encumbrance who has no notice of the facts. New England Mortgage Security Co. v. Hirsch, 96 Ala. 232; Dingman v. Randall, 13 Cal. 512; Walters v. Walters, 73 Ind. 425; Washington v. Slaughter, 54 Iowa 265; Holt v. Baker, 58 N. H. 276; Atkinson v. Plum, 50 W. Va. 104. If the debt is secured by negotiable paper and time is to be extended beyond the maturity thereof, the paper should, of course, be renewed to preserve the benefit of its peculiar salability, derived from the law merchant. See post, Chap. V.

A judgment at law upon the mortgage debt merges the debt but does not merge the security nor amount to a payment of the debt, but has the effect of a change in the form of the debt, leaving the mortgage a security for the judgment. Priest v. Wheelock, 58 Ill.

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114; Jewett v. Hamlin, 68 Maine 172; Torrey v. Cook, 116 Mass. 163. The same result was reached in Butler v. Miller, 1 N. Y. 496, where the judgment was taken by consent, upon the theory that it was a question whether the judgment was intended as a payment of the debt.

SECTION 2.—MERGER.

CAMPBELL v. CARTER.

SUPREME COURT OF ILLINOIS, 1853.
14 Ill. 286.

TREAT, C. J. The principal facts in this case are these. In April, 1841, Brush gave Farwell three promissory notes, amounting in the aggregate to $2,378.04; and he also executed a mortgage on lot forty-five in the town of Galena, to secure their payment. At the October term, 1842, of the Jo Davies circuit court, Farwell recovered a judgment against Brush for $2,104.17, the amount then due upon the notes; and also a judgment of foreclosure in a proceeding by *scire facies* upon the mortgage. An execution issued on the former judgment was returned "no property found," in March, 1843; and a special execution, issued on the latter judgment, was returned, in February, 1843, "not satisfied," by the order of the plaintiff. On the 18th of April, 1843, Brush and wife, by deed of general warranty, for the expressed consideration of $2,150, conveyed lot forty-five to Farwell in fee; and Farwell's attorney made an entry in the judgment docket, opposite each of the judgments, in these words: "This judgment satisfied by sale of real estate to the plaintiff." On the 29th of June, 1846, Farwell and wife, by deed of quitclaim, conveyed lot forty-five to Carter.

At the June term, 1842, of the Jo Davies circuit court, the State Bank of Illinois obtained a judgment against Brush, Hathaway, and Clark, for $436.42; and at the succeeding October term, it obtained a judgment against Brush and Miller, for $104.50. By virtue of an execution issued on the first of these judgments, lot forty-five was sold to Campbell, on the 16th of May, 1848, for the sum of $575.36; and it was sold to Campbell on the same day for one dollar, under the execution issued upon the last judgment. And on the 17th of August, 1849, Campbell received a sheriff's deed for the lot.

In November, 1848, Carter filed a bill in chancery against Campbell and others, praying that the mortgage might be decreed to stand as a subsisting security, to protect his title against the sale made under the judgments in favor of the bank. The bill alleged that Farwell knew nothing of the existence of those judgments when he

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accepted the deed from Brush. Campbell, in his answer, set up the purchase made by him at the sheriff's sale, and claimed title to the lot under the same. The cause was submitted to the court on certain documentary and record evidence, the substance of which has already been set forth, and the oral testimony of a witness, who stated that he was the attorney of Farwell in the original proceedings; that Farwell came to Galena in 1841, to obtain security for a debt he held against Brush, and Brush gave the notes and mortgage offered in evidence on lot forty-five; the debt was over $2,000, and the notes and mortgages were placed in witness's hands for collection in 1842; he instituted two suits, one in assumpsit, the other by *scire facias,* to foreclose the mortgage; judgments were recovered in both cases, on the same day, and for the same cause of action; executions were issued on those judgments, and a levy was made on the special *fieri facias,* and property advertised for sale; after the property was so advertised, Brush came to witness, and proposed to relinquish lot forty-five for the debt, to save expense, as it was all he had, giving as a reason it was all he had, and would save great expense and cost in selling; witness accepted the proposition, as Mrs. Brush was not a party to the mortgage, and Brush proposed they should both join in the deed to Farwell, which witness drew, and they executed; the entry of satisfaction in the judgment docket was made by witness about the time the deed was made by Brush and wife; subsequently witness made this addition: "The defendant having transferred to the plaintiff the mortgaged premises;" the release of the mortgaged premises by Brush and wife was all the satisfaction had for the judgment, and there was no entry of satisfaction made on the margin of the record of mortgages; the addition on the judgment docket was made prior to the year 1848, before any proceedings were had; there was no release given to Brush; Brush gave a deed, which is in evidence, releasing his equity of redemption; it was simply to take Brush's equity of redemption that this deed was given; Brush held the property at the time of the execution of the deed by Brush and wife to Farwell, and then attorned to Farwell, and Farwell and his grantees and tenants have been in possession ever since; the lot was never sold on Farwell's special *fieri facias* on the *scire facias* judgment; all procedeings were suspended on Brush and wife making the deed to Farwell; witness thinks the satisfaction on the docket was entered about the time of making the deed by Brush and wife; the addition was made some considerable time afterwards; cannot say how long; witness made the addition because the manner of the entry was subject to some misconsrtuction, and there had been some talk about it; witness thinks he has Brush's notes yet, as it was his usual practice to keep them; it was understood when the deed was made by Brush and wife, that this was a satisfaction and discharge of his debt."

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The court decreed that the mortgage should be held to exist and remain in full force, for the protection and security of the complainant's title. Campbell prosecuted an appeal.

At law, the mortgage was clearly extinguished. The mortgagee accepted an absolute deed of the estate, and entered satisfaction of the judgments obtained on the notes and mortgage. The debt was thus fully paid, and the security discharged of record. The question now is, can a court of equity still regard the mortgage as an unsatisfied and subsisting incumbrance? The equitable doctrine on this subject is thus stated by Sir William Grant in Forbes v. Moffat, 18 Ves. 384: "It is very clear, that a person, becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate, and keep up the charge. Upon this subject, a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law; and sometimes preserve it where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances, it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and, where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot." Again: "Where no intention is expressed, or the party is incapable of expressing any, I apprehend the court considers what is most advantageous for him." It is said by the Chancellor, in Compton v. Oxenden, 4 Brown's C. C. 397: "Where there is a union of rights, neither of them can be executed at law; but this court will preserve them distinct, if the intention to do so is either expressed or implied." Chancellor Kent remarks, in James v. Johnson, 5 Johns. C. R. 417: "If a person takes the legal estate by mortgage, and then, by his own act, takes the equity of redemption, and vests it in himself, the estate is discharged from the incumbrance. It would be a burden to no purpose. This is the good sense and reason of the thing. Where debtor and creditor become the same person, there can be no right put into execution; it must, of course, be extinguished. This is the general rule, both at law and in equity; the merger is prevented, and the distinction of the estates preserved, in special cases only. It is where the intention of the party is distinctly declared at the time, or where something just and beneficial requires the charge to be preserved, in a case in which the party has not declared, or can not declare, his intention." It is said, in Hatch v. Kimball, 16 Maine, 146: "It is, in each case, a question of intention, whether or not there is an extinguishment of the charge upon the estate. If, at the time the mortgage is taken in, the intention to extinguish it appears, that is decisive. If it does not, equity presumes it to be outstanding, or extinguished, as the interests of the party may require." The court say in Gibson v. Crehore, 3 Pick. 475: "When the pur-

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chaser of a right to redeem takes an assignment, this shall, or shall not, operate as an extinguishment of the mortgage, according as the interests of the party taking the assignment may be and according to the real intent of the parties." The same doctrine is laid down in the cases of Helmbold v. Man, 4 Wharton, 410; Moore v. Harrisburg Bank, 8 Watts, 138; Gardner v. Astor, 3 Johns. C. R. 53; and Starr v. Ellis, 6 Johns. C. R. 393. Indeed, there seem to be no conflict of opinion upon the subject.

The conclusion from all the authorities clearly is, that if a party acquires an estate upon which he has an incumbrance, the incumbrance is, in equity, considered as subsisting, or extinguished, according to his intentions, expressed or implied. The intention is the controlling consideration, where it has been made known, or can be inferred from the acts and conduct of the party. And the court will look into all of the circumstances of the case, to ascertain his real intention. If it appears, that he intended to discharge the incumbrance, and rely exclusively upon his newly acquired title, the incumbrance is regarded as extinguished, and cannot afterwards be set up to strengthen and support that title. If no intention has been manifested, equity will consider the incumbrance as subsisting, or extinguished, as may be most conducive to the interests of the party. If no evidence of his intention appears, and it is a matter of indifference to him whether the incumbrance be kept alive or not, it is regarded as extinguished.

Applying these principles, there can be but little difficulty in coming to a correct conclusion respecting this case. Farwell held notes against Brush, and a mortgage on the lot in question to secure their payment. He recovered judgments on both the notes and mortgage, and was endeavoring to enforce satisfaction. Brush then proposed to make an absolute conveyance of the lot, with covenants of warranty and a release of dower, in satisfaction and discharge of the debt. The proposition was accepted, and the deed executed; and thereupon Farwell entered satisfaction of the judgments. The transaction was not a mere release of the equity of redemption to the mortgage; not a mere giving up of the security in discharge of the debt. It was something more. In addition to the equity of redemption, Farwell obtained a relinquishment of the contingent right of dower, and the covenants of warranty of the mortgagor. There can be no doubt as to his real intentions in the matter. They were not left to inference or conjecture, but were manifested by the most unequivocal acts. He accepted the lot in full satisfaction of the indebtedness, and cancelled all existing evidence of that indebtedness. He intended to discharge the incumbrance, and rely exclusively upon the title acquired by the deed. If he designed to keep the incumbrance on foot, why did he discharge of record the judgment rendered on the mortgage? The debt was fully paid and

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satisfied, and this discharge of the judgment shows, that he considered the incumbrance as extinguished. It is not pretended that there was any mistake in the entry of satisfaction. The act was deliberately and intentionally done, and he, and those claiming under him, must abide the consequences resulting from it. It would be in clear violation of the real intention of the parties to resuscitate and set up the incumbrance.

It may be that Farwell entered into the arrangement under the belief and expectation, that he would acquire an unincumbered title to the lot. But that would not change the legal aspect of the case. It would only show that the arrangement was improvidently made. A court of equity will not interfere to relieve a party from the effects of an injudicious bargain. The fact that Farwell had no actual knowledge of the bank judgments, forms no basis for equitable relief. He had constructive notice of their existence, and that bound him as effectually as would express notice. He must be deemed to have acted upon full knowledge of those judgments. It was his own fault if he did not obtain the information before concluding the arrangement. He acted upon a misapprehension of his legal rights, and not upon a mistake of facts. The cases of Garwood v. Administrators of Eldridge, 1 Green's C. R. 145, and Banth v. Garmo, 1 Sanford's C. R. 383, are decisive on this point.

Not one of the numerous cases cited on the argument goes further than to hold, where the mere equity of redemption is released and the note is cancelled, that the mortgagee may still rely upon the mortgage to protect his title. But this is a very different case. The debt and the security were both cancelled. The release of the equity of redemption was not the only consideration received by Farwell. Besides the equity of redemption, he obtained the covenants of warranty of the mortgage, and the relinquishment of a dower interest in the lot. Holman v. Bailey, 3 Met. 55, is an authority very much in point. In March, Temple gave Bailey a mortgage on real estate, to secure the payment of five promissory notes, for $100 each. In April, Temple made a mortgage of the same premises to Holman. In May, Bailey took from Temple an absolute deed of the mortgaged premises, with covenants of warranty, in satisfaction of the five notes, and of another note for $300; and he gave up the six notes; but the mortgage was not formaly discharged. Holman filed a bill in equity against Bailey, to redeem the estate from the first mortgage. The court dismissed the bill on the ground, that Bailey's mortgage was extinguished. It said: "We think it very clear, that the notes then given, including the five secured by the mortgage, were in fact paid and discharged, by Temple, by the agreement in May. It was then agreed that the estate should be conveyed in fee, with warranty and without condition, in full satisfaction and discharge of those notes and the note for $300; and the estate was conveyed pur-

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suant to the agreement, and the notes were given up and cancelled. These were then at an end; they were effectually paid and extinguished."

Farwell having extinguished his incumbrance, the lien of the bank judgments attached upon the lot. He acquired the lot subject to these judgment liens, and could transfer no greater interest to Carter. The latter should have paid off the judgments, or redeemed from the sale to Campbell. These were the only modes of protecting his title.

The decree is reversed, and the bill dismissed. Decree reversed.[11]

SILLIMAN v. GAMMAGE.

SUPREME COURT OF TEXAS, 1881.
55 Tex. 365.

GOULD, Associate Justice. This action of trespass to try title was brought by Gammage to recover of Silliman seven hundred and seventy-nine and three-tenths acres of the John Parker headright survey. The facts stated are in the special findings of the district judge, to whom the case was submitted, and are substantially as follows:

On December 22, 1874, Ben Parker, being the owner of the land, mortgaged one thousand acres of the John Parker survey, including the land in the controversy, to secure his note for $500 to Silliman, due six months thereafter, drawing interest at the rate of five per cent. a month, the mortgage containing a power of sale, and being duly recorded. In July, 1876, one Longeton recovered a judgment

[11] Accord as to statement of principles: Welsh v. Phillips, 54 Ala. 309; Davis v. Randall, 117 Cal. 12; Smith v. Ostermeyer, 68 Ind. 432; Beacham v. Gurney, 91 Iowa 621; Gardner v. Astor, 3 Johns. Ch. (N. Y.) 53; James v. Morey, 2 Cow. (N. Y.) 246; Wilcox v. Davis, 4 Minn. 197.

"But it is said, that the mortgage was not a subsisting title at the time of the purchase of the estate by the plaintiff, because it was extinguished by merger in the superior title acquired by John Harris under the deed of Aldrich; or because it had been previously satisfied. As to the merger, it is clear, that there can be no such operation, as the argument supposes. At law by the mortgage a conditional estate in fee simple passed to the mortgagee; and the only operation of the conveyance of Aldrich would be to extinguish the equity of redemption, and thus to remove the condition. If that conveyance was good, it had the effect, not to enlarge the estate but to extinguish a right. It was not the drowning a lesser in a greater estate, for the estate was already a fee simple; but it was an extinguishment of the condition or equity. If that conveyance was void or voidable, it left the mortgaged estate exactly where it found it." Story, J., in Dexter v. Harris, 2 Mason (U. S.) 531. See also, Woodhull v. Reid, 16 N. J. L. 128.

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against Ben Parker, under which the land in controversy was sold as Parker's property, and was bought by Gammage August 7, 1877, for $25. The additional findings are given in the language of the presiding judge:

"On the 17th of June, 1879, within less than four years from the time the note for $500 was due, hence before the same was barred by limitation, Ben Parker, the mortgagor, made a deed to Silliman, conveying to him the one thousand acres of the John Parker, Sr., headright, of which the land sued for is a part, and also two hundred and fifty acres of the Jesse Gibson league, situated in Anderson county. This deed conveys the land mentioned with general warranty of title, and the testimony shows that at the date of this deed the debt secured by the mortgage amounted to $1,845, and that the land conveyed one thousand acres of the Parker headright and two hundred and fifty acres of the Jesse Gibson survey, making twelve hundred and fifty acres, was worth at a fair value about $1,250; that the land was taken by Silliman in full payment of his mortgage and debt, to save expense in proceeding on the mortgage, or by suit in court, and that Parker was unable to pay more than the land conveyed, and Silliman surrendered his note, mortgage and the balance of his indebtedness over and above the value of the land, to Parker at the time this deed was executed; and this transaction was in good faith and for a fair price. That Gammage was not a party to, or consulted about this transaction between Parker and Silliman, and Parker at the time had direct notice from Gammage of Gammage's purchase and deed, but Silliman had no notice except the constructive notice of the record of the deed.

"Upon these facts the court finds the law to be, that the mortgage of defendant was merged in the deed from Parker, and that the plaintiff has the superior title, and renders judgment for the plaintiff."

In his pleadings the defendant stated the facts, and claimed that under them he had the better title and right of possession, but, in the event the court held otherwise, claimed a mortgage lien for the note and interest, asked that "said lien be enforced, and that he have judgment for said sum of money against said Ben Parker, and said land be ordered to be sold, and that said Ben Parker be cited to appear in this case and answer, etc., and for all proper judgment."

As we have seen, the court disregarded this part of the answer, holding that the mortgage was merged in the deed, and thereupon gave judgment in favor of Gammage for the land sued for.

Counsel for appellant insist that, under the facts, Silliman had the superior title. In this state the mortgagor is regarded as the real owner, and until foreclosure entitled to the possession of the mortgaged premises. By the execution sale that ownership and right of

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possession vested in Gammage, subject to Silliman's mortgage. Wright v. Henderson, 12 Tex., 43; Duty v. Graham, 12 Tex., 427; Mann v. Falcon, 25 Tex., 271; Buchanan v. Monroe, 22 Tex., 537.

A foreclosure and sale, thereafter had, in a proceeding against Parker, without making Gammage a party, would have left Gammage's title and right of possession unimpaired. Preston v. Breedlove, 45 Tex. 47; Morrow v. Morgan, 48 Tex. 304, and numerous subsequent cases.

So, the voluntary deed by Parker to Silliman, made without Gammage's assent, could not affect his title or right of possession, whatever may have been its effect as between the parties thereto. As against Sillliman, Gammage continued to hold the superior title and right of possession, but held subject to whatever rights as mortgagee yet remained to Silliman, if any.

Strictly, the mortgage was not merged in the deed, as in case where a greater and less estate meet in the same person; for, by the execution sale and sheriff's deed, Parker had been divested of his entire interest, and his deed to Silliman, although it might as against himself have the same effect as a foreclosure sale, conveyed no greater estate in which the mortgage could merge. But we understand the court to find substantially, that under the facts Silliman's rights as creditor and mortgagee were totally satisfied, extinguished and lost; and it is not to be denied that numerous authorities, in cases strictly of merger, are supported on reasons which seem equally applicable to cases where the debt and mortgage have been in any way extinguished. Those authorities hold that the intention of the parties is the controlling consideration; and in this case, because Silliman had accepted the deed in full satisfaction of his debt and had surrendered up the note and mortgage, would infer that he did not intend for any purpose to keep the mortgage alive. See Campbell v. Carter, 14 Ill., 286, citing and discussing numerous cases; amongst others, Forbes v. Moffatt, 18 Ves., 384; James v. Johnson, 5 Johns. Ch., 417; Hatch v. Kimball, 16 Me. 146; Gibson v. Crehore, 3 Pick., 475. See also 1 Powel on Mortgages. But there are other authorities supporting a different view of the law, one which we think more consistent with the principles of equity, and more in accord with the course of decision in this state. In the case of Stanton v. Thompson, 49 N. H., 272, the authorities were largely discussed, and the court say:

"We think it may be deduced from the authorities quoted, that when the estates of the mortgagee and mortgagor are united in the former, he has in equity an election to keep the mortgage title on foot, and that whenever it is his interest, by reason of some intervening title or other cause, that the mortgage should be upheld as a source of title, it will not at law be regarded as merged. This is based upon the presumption as matter of law, that the party must

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have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security; and it is no matter whether the parties, through ignorance of such intervening title or through inadvertence, actually discharged the mortgage and cancelled the note, and really intended to extinguish them; still, on its being made to appear that such intervening title existed, the law would presume conclusively that the mortgagee could not have intended to postpone his mortgage to the subsequent title." In a recent treatise on mortgages the law is thus summed up: "It may therefore be deduced from the authorities, as a general rule, that when the mortgagee acquires the equity of redemption, in whatever way, and whatever he does with his mortgage, he will be regarded as holding the legal and equitable titles separately, if his interest requires this severance. The law presumes the intention to be in accordance with his real interest, whatever he may at the time have seemed to intend." 1 Jones on Mortg., § 873.

In the case of Monroe v. Buchanan, where there had been an invalid trust sale, at which, however, the purchase money had been paid and the note delivered up, this court says: "The lot was still chargeable with the debt; the lien upon it was not extinguished, and equity required, if necessary that justice might be done all parties, that the note although lost or destroyed, and the mortgage, should be recognized as a subsisting and valid charge upon the lot. It is a familiar maxim, that equity will hold that as having been done which should have been done; and it is equally true, that, in proper cases for its application, the converse of this proposition is as well established, and will hold that which should not have been done as still unperformed." 27 Tex., 246.

A class of cases, involving the same principle, that, to prevent injustice, equity will keep alive a debt, mortgage or judgment, although in law it may have been satisfied and the parties at the time so intended, is where there have been sales under decrees foreclosing liens, without making a subsequent vendee or mortgagee a party. This court has uniformly intimated its opinion that the purchaser, though he be himself the mortgagee or lienholder, might still, in a proceeding with proper parties, have the premises resold, the first sale and the satisfaction of the debt thereby being set aside or disregarded; the object being that equity might still be done between all parties. Pitman v. Henry, 50 Tex., 364-5; Carter v. Attoway, 46 Tex., 111; Jemison v. Halbert, 47 Tex., 190.

To the same effect are Besser v. Hawthorne (7 Oregon, 131), and Hollister v. Dillon, 7 Ohio St., 197. In the latter case the mortgagee had obtained judgment for his debt without subjecting the land, and at an execution sale under that judgment became himself the purchaser. In consequence of intervening rights, no title passed by this sale; but the court denied that such a sale could

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operate as a payment of the debt for the benefit of those who had purchased subject to the mortgage. It says: "Such a sale of mortgaged property to the mortgagee cannot operate to deprive him of rights existing anterior to and independent of the judgment. That if such a mistake does not on the one hand lay a foundation for equitable relief, it does not, on the other, give any advantage to the debtor, when set up as a defense in a suit brought upon the mortgage, over which a court of equity has unquestioned jurisdiction."

The case of Jemison v. Halbert is one much in point, and fully supports the conclusion that the court erred in holding the mortgagee extinguished as to Gammage. See also Robinson v. McWhirter, 52 Tex., 201.

In the present case Silliman acted in ignorance of the existence of Gammage's title, and therefore labored under a mistake of fact, and notwithstanding he for some purposes had constructive notice, our opinion is that equity would give him relief.

For the purpose of protecting Silliman against the intervening claim of Gammage, the court should have treated the mortgage as in force, except so far as the secured debt had been paid by the conveyance of lands not embraced in the mortgage. This question is directly made in assignments of error, but can hardly be said to be distinctly presented in the briefs of counsel for appellant. We have regarded it, however, in view of its fundamental nature in reference to the rights of the parties, as sufficiently before us. It was unnecessary to make Parker a party. Monroe v. Buchanan, supra. No judgment could be rendered against him.

* * * * * * *

The judgment is reversed and the cause remanded.[12]

[12] See also, Brooks v. Rice, 56 Cal. 428; Hines v. Ward, 121 Cal. 115; Lowman v. Lowman, 118 Ill. 582; Farrand v. Long, 184 Ill. 100; Hanlon v. Doherty, 109 Ind. 37; Fort Scott Bldg. & Loan Assn. v. Palatine Ins. Co., 74 Kans. 272 (semble); Cooper v. Bigly, 13 Mich. 463; Cook v. Foster, 96 Mich. 610 (semble); Miller v. Finn, 1 Nebr. 254.

"It is said that mergers are odious in equity, and shall not be allowed, where the estates may well stand together. Here, we think, that both in law and equity, the estates may both stand together.

"In order to effect a merger at law, the right previously existing in an individual, and the right subsequently acquired, in order to coalesce and merge, must be precisely co-extensive, must be acquired and held in the same right, and there must be no right outstanding in a third person, to intervene between the right held and the right acquired. If any of these requisites are wanting, the two rights do not merge, but both may well stand together. But the case we are considering supposes that a third person has, by operation of law, by purchase or by attachment, acquired certain rights or claims to the equity of redemption, which do not extend to the mortgage. When, therefore, the equity of redemption by purchase, and the mortgage by assignment, vest in the same individual, they do not coalesce or merge, if there be in a third person a right of dower, a right acquired by purchase, or a real lien by

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CLAY v. BANKS.

SUPREME COURT OF GEORGIA, 1883.
71 Ga. 363.

HALL, J. This immense record, covering one hundred and forty-eight printed pages, and out of which issued three separate bills of exception, makes but one controlling question, viz: whether the purchaser of land incumbered with a mortgage, which he agrees to extinguish, in order that one which he executes in favor of the vendor to secure the remainder of the purchas money may have priority, can afterwards, instead of satisfying the first mortgage, take an assignment of it to himself, and by pledging it to a third person, who had no notice of the contract with the vendor, as security for a loan, displace and postpone the lien of the last mortgage, in violation of the contract; and whether this assignment is not an extinguishment in favor of the last mortgage. We are of opinion that this question must be answered in the affirmative; and further, that the question of notice, so far as respects of the vendor, under this view of the case, becomes immaterial, as to any claim set up by the present holder of the assigned mortgage, as against the junior mortgage. It is familiar learning that the assignee of a chose in action, other than promissory notes, bills of exchange, etc., takes it subject to the equities existing at the time of the transfer between the original parties, and to such as subsequently arise, unless notice be given to the party bound. Row vs. Dawson, Ryall vs. Rowles, 2 W. & T. Lead. Cases, 1531 *et seq.* Clay, the assignee of the older mortgage, already had the title to the land when he became the owner of the mortgage, the incumbrance was, *eo instanti*, merged in the title. As a general rule, a party cannot be said to hold a lien upon his own property. This is never allowed, except where equity intervenes and keeps the lien outstanding to protect the title, and thereby prevent a failure of justice. 94 U. S. R., 413. The pur-

attachment, intervening between the mortgage and the equity." Shaw, C. J., in Hunt v. Hunt, 14 Pick. (Mass.) 374.

"The tenant, by virtue of his prior attachment, goes behind the deed, given by the mortgagor to the demandant (the mortgagee), and avoids it. He is remitted to the state of the title, at the time of the attachment. He can not be permitted to defeat the deed for one purpose, and to set it up for another." Weston, J., in Crosby v. Chase, 17 Maine 369.

"Where a mortgagee becomes the owner of the legal title * * * if there are junior mortgages on the land, it will be necessary to keep the titles separate, so as to protect the mortgagee from such inferior liens. As between the mortgagor and mortgagee a merger would be proper, but not as between the holders of the different mortgage liens. Instances might be multiplied where merger would be unobjectionable as to some parties and injurious to others." Graves, J., in Fort Scott Bldg. & Loan Assn. v. Palatine Ins. Co., 74 Kans. 272.

Compare, Matzen v. Shaeffer, 65 Cal. 81.

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pose of this assignment accords with this principle. Clay took it that the lien of the mortgage which had been foreclosed by a decree might be kept "alive, for the protection or defence of any title acquired by him or his assigns to the lands covered by the same." This plainly appears from the terms of the assignment. Dickson vs. Williams, 129 Mass., 182, is directly upon the question of merger, under circumstances similar to those made by this case. In Carlton vs. Jackson, 121 Mass. R, 592, 596, it was distinctly laid down, as a rule applicable to a transaction like this, "that when the money is paid by one whose duty it is, by contract or otherwise, to pay the mortgage, it is a release, though in form it purports to be an assignment. Brown vs. Lapham, 3 Cush., 551; Braman vs. Dowse, 12 Cush., 227. "The subsequent assignment of the mortgage" by the party whose duty it was to extinguish it, "could give no title" to the assignee, "as against the plaintiff."

The only difference between this case and ours is, that in that there was a written obligation in the deed conveying the premises, binding the grantee to extinguish the mortgage; in ours that obligation rested in parol, and it is insisted here that the cases, as to notice, are, for this reason, clearly distinguishable. The record of the deed was notice binding upon subsequent assignee; in this case, there could be no such notice. Even if notice were necessary, in order to defeat a subsequent assignment and a sale made under a process that was extinguished, there are circumstances quite sufficient here to have put Mr. Mills, the ultimate assignee, upon inquiry and to affect his conscience with direct, which is more effectual for this purpose than constructive notice, implied from the record of an instrument.

* * * * * * *

Judgment reversed.[18]

HARTSHORNE v. HARTSHORNE.

COURT OF CHANCERY OF NEW JERSEY, 1840.
2 N. J. Eq. 349.

The Chancellor (PENNINGTON). This is a bill for dower. The complainant alleges, that her husband was seized in fee of certain lands in the county of Monmouth, during their coverture, of which she claims to have set off one-third part for her dower. It is stated in the bill, that prior to the marriage, her husband gave a mortgage on the property whereof dower is claimed, for three thousand dol-

[18] Compare Goodyear v. Goodyear, supra. See also, McCabe v. Swap, 14 Allen (Mass.) 188; Hatch v. Palmer, 58 Maine 271; Burnham v. Dorr, 72 Maine 198; Kingsley v. Purdom, 53 Kans. 56; Probstfield v. Czizek, 37 Minn. 420.

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lars, on which payments had been made reducing it to eleven hundred dollars, and that such mortgage has been assigned to the defendant. The defendant purchased the equity of redemption at sheriff's sale, and afterwards procured the assignment of the aforesaid mortgage. The bill further states, that during marriage, the complainant and her husband also executed a mortgage on the property for two thousand two hundred dollars, which has been reduced by payments to six hundred dollars, and is held by John W. Holmes. Other mortgages are set out in the bill, but as they are said to be paid off and discharged it is not material to state them here. To this bill there is a demurrer for want of equity and for want of parties, which presents some questions important to be settled.

* * * * * * *

The defendant is a purchaser of the equity of redemption in the premises whereof dower is demanded, and has by assignment become the owner of a mortgage made by the husband prior to his marriage with the complainant. On the one side, it is insisted, that by this assignment the mortgage became merged or extinguished when it came into the defendant's hands; and on the other, that the defendant is a mortgagee in possession, and the complainant's rights thereby barred. A purchaser of the equity of redemption at a sheriff's sale, takes the property *cum onere,* and acquires no rights beyond what remain in the mortgagor after satisfying the incumbrance out of the land. If, by any device or circuity, such purchaser should procure the payment of the mortgage without a resort to the land, as by suit against the mortgagor or his representatives on the bond, manifest injustice would take place; for he would then have the property clear of the very debt subject to which it was sold. By such a course a purchaser, for a nominal sum, might become possessed of a valuable estate, and the mortgagor virtually twice discharge the same debt. This difficulty was presented to Chancellor Kent and fully settled by him, in the case of Tice v. Annin, 2 Johns. Ch. 125. The rule he established in that case was this: If a creditor other than the mortgagee sells the equity of redemption by an execution at law, the mortgage debt remains undisturbed, and the rights of the mortgagor over and above the mortgage in the property are rightly disposed of to satisfy his creditors.

This case presents no embarrassment. But suppose, after the equity of redemption is thus sold subject to the incumbrance, the mortgagee should prosecute his bond at law, and undertake to sell other property than that contained in the mortgage. Then the chancellor held that a court of equity should either stay such proceedings, or compel the creditor, upon payment, to assign over his debt and security to the debtor, to enable him to indemnify himself out of the mortgaged premises. But in the case referred to, there existed a still greater difficulty. The mortgagee sold the equity of

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redemption in the mortgaged premises for a part of the debt, and then put it out of his power to assign the securities to the mortgagor by actually assigning them over to the purchaser of the equity of redemption; and to prevent gross injustice, the chancellor, as the only alternative, held the debt extinguished in the hands of the purchaser. All this proceeds on the idea that the land discharged of the incumbrance, and if he attempt to make the debt by buying up the bond and mortgage and recovering the amount unjustly out of the obligor, the debt shall in his hands be considered extinguished. In a case so circumstanced, this result seems unavoidable, to prevent the grossest injustice and wrong. But I do not understand this case as going the length of saying, that a purchaser of the equity of redemption can be compelled, in all cases, to pay off the antecedent incumbrances farther than the land itself will discharge them. The purchaser placed himself in a peculiar position, and was attempting thereby to do a wrong; and the chancellor, to avoid such wrong, held the debt cancelled in his hands. There are cases, I am aware, which look like holding the purchaser liable for the debt personally, but I cannot think that such is the true doctrine. It is not necessary for me to decide this question here, but I desire to state my conviction, that the purchaser is liable to the extent of the land purchased, and no further, and that he will at all times be discharged upon releasing the land. There is no privity between the mortgagee and the purchaser, and I cannot see upon what principle he can be reached, except it be through the land which he has purchased. I speak not now of a case where the purchaser enters into special obligation to pay antecedent incumbrances; all such cases will be governed by the terms and character of the contract; but of the ordinary purchaser without special agreement, depending on the obligation which the law in such cases imposes. Indeed it is matter of doubt whether it is intended, from the cases, to go farther than the principle as I have stated. The doctrine proceeds upon the idea that a court of equity, independent of any express contract, will raise upon the conscience of the purchaser an obligation to indemnify the mortgagor against his liability on the mortgage; but to what extent? Certainly not beyond the land purchased. This subject will be found discussed Waring v. Ward, 7 Vesey. Jr. 337; Cumberland v. Coddington, 3 Johns. Ch. 261; Stevenson and Woodruff v. Black, Saxton, 342. It is every day's practice to sell the equity of redemption by an execution at law, sometimes at the suit of the mortgagee and sometimes of other creditors. If a purchaser could be called upon to discharge all incumbrances on his personal liability, it would greatly embarrass these sales, and effectually prevent their being made.

But whether this view of the subject be correct or not, and recognizing the decision in 2 Johns. Chan. to which I have referred, in

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which the bond and mortgage assigned to the purchaser of the equity of redemption was held to be an extinguishment of the debt, still, as it affects the right of dower of the widow in the lands, a new and very different question is presented. It is agreed, that if the husband before marriage, or in conjunction with his wife after marriage (the deed being acknowledged by the wife, in due form of law), execute a mortgage, and it remains in the hands of the mortgagee, the widow can only have her dower subject to such mortgage; and when this defendant purchased the equity of redemption, he purchased with the widow's right discharged to that extent on the property. Had the mortgage remained as it then was, in the hands of the mortgagee, the widow's dower would have been subject to it, and why should it be otherwise now that it is transferred to the purchaser? Had a foreclosure and sale taken place under the mortgage, the widow would have been barred her rights, except as to the surplus beyond satisfying the mortgage. At her husband's death the true claim this widow had was to one-third of the land after the mortgages were satisfied, and nothing more. In the case in 5 Johns. Chan. before cited, it was held that the widow was bound to contribute her ratable proportion towards a mortgage which she had executed with her husband, and which the heir had been obliged to pay off, before allowing her dower in the land. The chancellor in that case says, "To allow her the dower in the land without contribution, would be to give her the same right that she would have been entitled to if there had been no mortgage, or as if she had not duly joined in it. It would be to give her dower in the whole absolute interest and estate in the land, when she was entitled to dower only in a part of that interest and estate."

But the case of Russell v. Austin, in 1 Paige, 193, will be found similar to the one we are now considering. That was a purchase of the equity of redemption at a sheriff's sale, and an assignment to the purchaser of a bond and mortgage made by the husband and wife. It was there argued, that the debt was extinguished and merged by the assignment; but the court held the widow entitled to her dower in the equity of redemption only, subject to the mortgage. In that case, as in this, the intention of the purchaser not to extinguish the debt was manifest, for instead of cancelling the securities he had them assigned to him.

From every view, therefore, which I have been able to give this case, I cannot think this widow entitled to anything more than her dower in the lands subject to the outstanding mortgages, including the one assigned to the defendant.[14] She is entitled to her

[14] See also, Watson v. Gardner, 119 Ill. 312; Simonton v. Gray, 34 Maine 50; Gibson v. Crehore, 3 Pick. (Mass.) 475; Snyder v. Snyder, 6 Mich. 470; Hinds v. Ballou, 44 N. H. 619; Everson v. McMullen, 113 N. Y. 293. In the last case the mortgage had been discharged but the payor was held entitled to subrogation. See also, Ryer v. Gass, 130 Mass. 227.

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dower in the lands in the possession of the defendant, (upon the case stated in the bill), upon keeping down one-third of the interest on the amount due on the property.

* * * * * * *

While, therefore, my opinion is with the defendant on the main question in the cause, yet, as his demurrer is to the whole bill, and the complainant is entitled to her dower in the equity of redemption, and as there is no defect of the parties, the demurrer must be overruled with costs.

Demurrer overruled.

"One who purchases property at an execution sale, is in the same position in respect to previous encumbrances as one who takes a quitclaim deed, or one who takes a deed expressly subject to encumbrances which constitute a charge upon the land. Such persons do not become personally liable to pay pre-existing encumbrances, but as in each case the purchaser is deemed to have deducted the amount of the prior encumbrances from the purchase price, the land in his hands becomes the primary fund out of which the encumbrances are to be paid. When the purchaser pays them off, no matter by what method, they will be treated as extinguished, unless there is some equitable purpose to be subserved by keeping them alive. * * *

"There could be no just motive or equitable purpose which would authorize Grave to keep his own mortgage alive against his own land. * * * He knew when he purchased the land at the exceution sale that, under the law of 1875, he acquired a right, and could obtain title, as against the wife of the execution debtor to the undivided two-thirds of the land and no more. He was bound to know that as to the prior mortgages, executed by Mrs. Bunch and husband, for the latter's debts, she occupied a relation analogous to that of a surety. The two-thirds as to her was, therefore, charged with the payment of the whole debt, provided the land was of sufficient value. * * * He was, in effect, the principal, because he was in possession of the fund out of which the debts were to be paid, and which it is admitted, was sufficient to pay the debts. In effect, he had in his hands the money with which to pay the encumbrances which rested upon the lands of both. When he paid them, he simply discharged his own primary obligation, out of a fund which he held for the benefit of himself and Mrs. Bunch." Mitchell, J., in Bunch v. Grave, 111 Ind. 351. See also, Campbell v. Knights, 24 Maine 332; Byington v. Fountain, 61 Iowa 512. But see, Braden v. Graves, 85 Ind. 92.

Compare Arnold v. Green, supra. It is commonly said that it is immaterial whether, in such a case, the mortgage is discharged or assigned, the idea being that, if the equities are not such as to warrant relief by way of subrogation in the case of a discharge, there will be a merger in the case of an assignment; and, conversely, if the equities are such as to prevent merger in the case of an assignment, relief may be had, in the case of a discharge, by way of subrogation. See, however, Eaton v. Simonds, 14 Pick. (Mass.) 98, and Gibson v. Crehore, post.

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DICKASON v. WILLIAMS.

SUPREME COURT OF MASSACHUSETTS, 1880.
129 Mass. 182.

Contract upon a promissory note for $3,000, dated March 29, 1870, payable to the plaintiff or order five years after date, and signed by the defendant. Writ dated November 2, 1878. The answer admitted the making of the note, but averred that it was a mortgage note, and that the mortgage had merged. At the trial in the Superior Court, before WILKINSON, J., the following facts appeared in evidence:

The note sued on was secured by a mortgage deed, containing the usual power of sale, of land on Henchman Street, in Boston, delivered by the defendant to the plaintiff on March 29, 1870. The defendant conveyed the land to John and Bridget Wills, by deed dated February 5, 1874, which contained these words:

"And I do hereby for myself and my heirs, executors, and administrators covenant with the said grantees and their heirs and assigns that I am lawfully seised in fee simple of the granted premises; that they are free from all incumbrances, excepting a mortgage thereof for $3,000, which, with the interest thereon, the grantee assumes and agrees to pay." John and Bridget Wills conveyed the land to the plaintiff by a deed dated September 30, 1878, in which the consideration named was $3,500, and which contained these words: "The above conveyance is made subject to a mortgage of $3,000, which mortgage forms part of the above consideration." After the date of the writ in this action, the plaintiff conveyed the land to Dennis Winterson. The plaintiff also introduced testimony to prove that the market value of the land when conveyed to her by John and Bridget Wills was not over $2,500, and it was admitted that the plaintiff paid nothing to John and Bridget Wills for said conveyance.

Upon these facts, the judge ruled that the plaintiff's claim against the defendant for the balance of the note over and above the market value of the land on September 30, 1878, was not extinguished. The jury returned a verdict for the plaintiff for $707.95; and at the request of the defendant, the judge reported the case for determination of this court. If the ruling was right, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside, and a new trial ordered.

AMES, J. It appears from the report that the note in suit, which was for $3,000, was given by the defendant to the plaintiff, and was secured by a mortgage upon certain premises in Henchman Street in Boston. The note and the mortgage were of the same date, and

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there is no intimation of any other mortgage on the property. Some years afterwards, and before the note became due, the defendant conveyed the property to John and Bridget Wills, subject to the mortgage, it being recited in the deed that the grantees assumed and agreed to pay the mortgage. The effect of this transaction was to impose upon grantees, by their acceptance of such a deed, a duty to make the payment, upon which the law would imply a promise to do so. Pike v. Brown, 7 Cush. 133; Braman v. Dowse, 12 Cush. 227; Jewett v. Draper, 6 Allen, 434. Subsequently, and after the maturity of the note, these grantees, in consideration of $3,500, conveyed the mortgaged property to the plaintiff subject to the mortgage of $3,000, "which mortgage forms part of the above consideration." In other words, the plaintiff repurchased the property, or took it back, and part of the price of this repurchase was the debt or claim which she at the time held against the same property. The plaintiff accepted a deed, which on its face imported that the amount due to her upon this note, which John and Bridget Wills had become liable to pay, was reckoned and included in the consideration for that very deed. This mode of dealing operated as a payment of the mortgage debt, by a party legally bound to pay it, to a party entitled to receive it. Upon these facts, the same person who held the mortgage has become the holder of equity of redemption, and there being no intervening incumbrance or outstanding interest in any other person, the mortgage is merged and the debt extinguished. 2 Wash. Real Prop (4th ed.), 193, and cases here cited.

Verdict set aside, and new trial ordered.[15]

SPENCER v. HARFORD.

SUPREME COURT OF NEW YORK, 1830.
4 Wend. (N. Y.) 381.

[Demurrer to pleas. The declaration is in debt on bond executed by defendant's testator to plaintiff.]

By the Court, SAVAGE, C. J. The defendants plead four pleas, the object of which seems to be set up the same defence, to wit, a satisfaction of the debt by an extinguishment of a mortgage which was given as collateral security at the same time the bond was executed.

* * * * * * *

The third plea states that Fellows, by the sheriff's deed became seised of the equity of redemption; and that being requested by the

[15] Compare, Johnson v. Walter, 60 Iowa 315; Moore v. Olive, 114 Iowa 650; Russell v. Pistor, 7 N. Y. 171; Kellogg v. Ames, 41 N. Y. 259.

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plaintiff either to pay the debt due him or to assign to him the equity of redemption in the mortgaged premises, Fellows conveyed for the consideration of one dollar, whereby the plaintiff became seised thereof, and the debt became paid and satisfied. The fourth plea is like the third, except it contains the additional averment that the plaintiff on the 17th November, 1825, sold the premises in fee for $650 to John Harford.

We thus learn in these pleas, by way of inference, that Fellows purchased the equity of redemption in the mortgaged premises, and that the plaintiff became assignee of the same for a nominal consideration; and that he sold the premises in fee for $650. Had the third plea contained an averment that the value of the premises when the equity of redemption was conveyed to the plaintiff was equal to the amount due on the bond, or had the fourth plea contained an averment that the property was of the same value when the equity of redemption was conveyed to the plaintiff as when he sold to Harford, or was of value equal to the amount due on the bond, I should think the pleas good in substance, though in some respects informal.

The only effect of the sheriff's sale was to substitute Fellows in the place of the mortgagor; when, therefore, the mortgagor released his equity of redemption for a nominal consideration to the mortgagee, the latter had the whole estate. Whether this effect is produced by a technical merger of the equitable into the legal estate, according to 2 Cowen, 246, or whether he holds the legal estate discharged of the condition, according to 2 Mason, 539, it is not important to inquire. The mortgagee becomes absolute owner, as he would by a foreclosure; and if the property when he thus receives it is equal in value to the debt for which it was mortgaged, it is payment in full; otherwise, not: but, in any event, is payment, *pro tanto,* acccording to its actual value.

The pleas do not contain the necessary averments. It may be that the property was well worth $650 or more when sold to J. Harford, and not worth $100 when the title was vested in the plaintiff; the difference may have been caused by improvements or a rise in the value of the land. The value therefore should appear by proper averments.

The pleas are all bad, and the plaintiff is entitled to judgment upon them, with leave to the defendants to amend, on payment of costs.[16]

[16]Compare, Lilly v. Palmer, 51 Ill. 331; Murphy v. Elliott, 6 Blackf. (Ind.) 482; Northwestern Nat. Bank v. Sloan, 97 Iowa 183; National Investment Co. v. Nordin, 50 Minn. 336; Tucker v. Crowley, 127 Mass. 400 (cf. Pratt v. Buckley, 175 Mass. 115). See also, 15 Harv. L. Rev. 740.

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EDITORIAL NOTE.

On discharge by alteration, see Kendall v. Kendall, 12 Allen (Mass.) 92; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119.

On discharge by foreclosure, on the effect of bankruptcy of the mortgagor, and on the effect of the statute of limitations, see post, Chap. VII.

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CHAPTER V.

ASSIGNMENT OF MORTGAGES.

YOUNG v. MILLER.

SUPREME COURT OF MASSACHUSETTS, 1856.
6 Gray (Mass.) 152.

SHAW, C. J. The plaintiff is indorsee of one of two negotiable notes, one for $300, the other for $750, secured by a mortgage. The payee indorsed the $300 note to the plaintiff, but did not assign the mortgage or any part of it, but retained it and the other note secured by it, and afterwards transferred them, and the assignee discharged the mortgage.

The plaintiff now brings this writ of entry to foreclose the mortgage, and claims that she had an interest in the mortgaged premises *pro tanto,* and that the mortgage could not be discharged in full, to her injury; and that, although the present defendant came in by an apparently good title, yet that the estate was subject to her lien.

A proposition of this sort, not only that the holder by indorsement of a negotiable note, originally secured by mortgage, has some equitable interest in the mortgage under some circumstances, but that she may maintain a real action in her own name to recover the land, is so contrary to settled notions here, that it seems quite startling. It seems to be repugnant to what have long been regarded in this state as first principles.

The true character of a mortgage is the pledge of real estate to secure the payment of money, or the performance of some other obligation. Its object, from its creation to its redemption or foreclosure, is that of a pledge for such debt or duty. It may, in many aspects, be called a real lien, a chattel interest, a chose in action, and *quasi* personal. But as it binds land, and may lay the foundation of a title to real estate, it assumes, in many respects, the character of a land title. It is so in its origin, by deed; in the mode of giving it notoriety, by registration; in its transfer, by deed of assignment; its discharge, by deed of release; and in the mortgagee's remedy, by writ of entry against the mortgagor or other person in possession under him.

It may be admitted that there are equitable and incidental inter-

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ests, which are recognized and enforced in a court of equity only. Whatever may be the tendency to confound legal and equitable rights, there is great convenience, if not safety, in keeping up this distinction.

But whatever may be the equitable interest of a party situated like the present plaintiff, it seems to us that she can stand in no higher relation than that of a *cestui que trust*, having an equitable interest in real estate, the legal title to which is in another; such interest being manifested by an actual or resulting trust. In this case, it is difficult to perceive, without further evidence, that she can establish any such trust. The original payee held two negotiable notes, both secured by one and the same mortgage. The notes constituted personal contracts of the maker, independent of the mortgage, both or either of which might be enforced as such, without reference to the mortgage. It was therefore competent for such payee and mortgagee, if such was his real intention, to indorse one of the notes and give his indorsee all the legal title thereto, as a personal contract, and retain to his own use the entire mortgage interest, or pledge of the realty, as security for his other note.

When a party holds a mortgage to secure the payment of a single negotiable note only, and no formal assignment is made of the mortgage, and nothing to indicate an intention of the parties that it is not to be assigned; as the mortgagee and indorser of the note, after such indorsement, would hold only a barren fee, without beneficial interest, and as the mortgage accompanying the note would be highly beneficial to the indorsee for the security of his note, the law may well imply the intention of the parties that the mortgage is thenceforth to be held by the mortgagee in trust for the indorsee. In other words, such a transaction might manifest a resulting trust. But when such mortgage is given for two such negotiable notes, and the holder indorses one, without the expression of any intent, either to retain the mortgage to his own use as security for his remaining note, to the security of which alone perhaps it is adequate, or to hold it in trust for himself and his indorsee, and when therefore the mortgagee has a beneficial interest in the mortgage, and there is nothing express in favor of the indorsee, it may perhaps be doubted whether any resulting trust would be implied.[1]

[1]"The principle that an assignment of the debt involves an assignment of the mortgage security applies in the case of an assignment of a part only of the debt, which is usually effected by a transfer of one of several notes evidencing the debt, and in such cases the assignee is entitled to share in the benefit of the mortgage security. When the various notes secured by the mortgage are transferred to different persons, a question arises as to the respective priorities of those persons in case the mortgaged land is not sufficient to pay all the notes in

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But supposing that such a trust would be implied, then the question is, whether such *cestui que trust* can maintain a real action. The opinion of the court is that he cannot. And we think that no case cited in the learned argument of the plaintiff's counsel, rightly understood, leads to any different result.

The case cited of Martin v. Mowlin, 2 Bur. 978, contains some very strong expressions of Lord Mansfield, to the effect, that whatever transfers the money secured by mortgage, transfers the land. Mr. Justice Wilde, in Parsons v. Welles, 17 Mass. 424, following Judge Trowbridge, thinks that there must have been some qualifying expressions, which the reporter omitted to state, in that case. But with reasonable limitations, arising plainly from the subject-matter, it does not import anything contrary to the law, as held in Massachusetts. The only point adjudged was, that when, by the terms of a will, real estate is given to one, and money and personal property to another, a mortgage due to the testator, although it had become absolute at law by the nonpayment of the debt at the day, being still redeemable in equity by the established rules of chancery, should be considered personal property, and pass to the legatee of the personal estate, and not land, to go to the devisee of the realty. It was inferring the intent of the testator from the nature of a mortgage, as a pledge and security for money, and not as land, so long as it is redeemable.

Green v. Hart, 1 Johns. 580, was a case in the court of chancery, and the equitable rights and remedies only of the plaintiff were drawn in question. But in that case the mortgage was given for the security of one note only, and the mortgage deed was delivered with the note to the indorsee, and this act was clearly an indication of the intent of the mortgagee to give the indorsee the benefit of the mortgage.

full. In some states the rule has been adopted that, if the notes in the hands of different persons mature at different times, as is usually the case, they are entitled to priority, as regards the benefit of the mortgage, in the order of their maturity. In other states, the assignees of the different notes are entitled to share in the proceeds of the mortgaged land in proportion to the amounts of their respectve notes, without reference to the time of their maturity. The rights of the assignees of the notes in this respect may also be controlled by an express stipulation in the mortgage, or by an agreement made at the time of assigning a note, as to the order of priority:

"Occasionally, though not usually, the view has been taken that a mortgagee who assigns one or more of the notes, retaining the balance, cannot claim to share in the benefit of the mortgage security as against his assignee, since he is presumed to have been paid by the latter the value of the notes assigned, and it seems to be agreed that a contract to this effect is to be presumed from the fact that the mortgage is assigned with the notes. Likewise, if the mortgagee is a surety for the payment of the note, he cannot claim a part of the benefit of the mortgage as against his assignee." Tiffany, Real Property, § 533.

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Jackson v. Blodgett, 5 Cow. 203, was the case of a mortgage to secure one debt on a bond not negotiable; the bond was assigned without the mortgage, and the debtor had notice thereof. Afterwards, acting under a supposed power of the mortgagee, without legal authority and by collusion with the debtor, an agent received payment of the debt and discharged the mortgage. It was decided that the discharge was fraudulent; the payment by the debtor, after notice of the assignment of the bond, a payment in his own wrong; and that an action might be maintained by the original mortgagee, in connection with the assignee of the bond, for the benefit of the latter.

Jackson v. Willard, 4 Johns. 41, decided that the interest of a mortgagee in mortgaged premises could not be taken in execution by the sheriff and sold to satisfy the debt of the mortgagee, until foreclosure, though the estate of the mortgagee had become absolute at law; because, whilst redeemable in equity, it was but a pledge for a debt; which is quite consistent with our laws.

Our own authorities are numerous, and we think decisive. Reading of Judge Trowbridge, 8 Mass. 554, and seq.; Warden v. Adams, 15 Mass. 233; Somes v. Skinner, 16 Mass. 348. In that case, suit was brought for several tracts of land; it turned out that, though the plaintiff had a legal title to several, one was held by a trustee for him; and it was held, that he could not maintain a real action for that; and on motion he was allowed to discontinue as to that parcel. Parson v. Welles, 17 Mass. 419; Crane v. March, 4 Pick. 131. In that case, it was held, that if the indorsee of one of several notes secured by mortgage, without assignment, has any right to the mortgaged estate in security, it is only in equity, as *cestui que trust,* the legal estate being in the mortgagor. Of course he could not maintain a real action.

In conclusion, the court are of the opinion that, under the circumstances, if the plaintiff, by taking one of two notes secured by mortgage, by indorsement, without any assignment of or reference to the mortgage, took it with any resulting trust in the mortgaged premises—upon which it is unnecessary to express an opinion for the decision of this cause—she took no legal interest in the realty, and therefore that this action cannot be maintained.

Judgment for the defendant.

KENT, J., in JOHNSON v. HART, 3 Johns. Cas. 322 (N. Y. Court of Errors, 1802). Here was a note given to Green, which was secured by a mortgage. Wherever the note goes it will carry the charge upon the land along with it. The estate in the land is here the same thing as the money due on the note. It will be liable to debts; it will go to executors. It will pass by a will not made with the solemnities of the statute of frauds. The assign-

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ment of the debt, or forgiving it even, by parol, draws the land after it, as a consequence. The right to the land will follow, notwithstanding the statute of frauds. This doctrine was established by the court of K. B. as early as the year 1760; (2 Burr. 978, 979), and according to this doctrine, when Green duly negotiated his note to Hart, the interest in the mortgage, which was given for no other purpose but to secure that note, passed of course. It required no writing, no assignment on the back of the mortgage. The assignment of the note applied equally to the note and the pledge. The one was but appurtenant to the other. Whoever was owner of the debt, was likewise owner of the security. There must be something peculiar in the case, some very special provision of the parties, to induce the court to separate the ownership of the note from the ownership of the mortgage. In the eye of common sense and of justice, they will generally be united.

By the transfer, then, of the note to Hart, the mortgage went with it, and the same interest passed in the one as in the other. Had this been an absolute transfer, there could have been no good reason for requiring Green to be a party to the suit, because he had no further interest in the subject. He could not be considered as having any longer even the estate at law in him. From the doctrine to which I have referred, he would be considered at law, as well as in equity, as having passed all his interet in the mortgage, by the assignment of the note. The assignment of the one would be deemed an assignment of the other.[2]

BRICKELL, C. J., in WELSH v. PHILLIPS, 54 Ala. 309 (1875). Whether a mortgagee may by an assignment to a stranger of the mortgage, or by a conveyance of the premises, unattended by a transfer of the mortgage debt, pass the legal estate, is a question on which the authorities in this country are in irreconcilable conflict. In New York, New Hampshire and some other states which have followed their decisions, such a conveyance or assignment would be void, and one entering under it would be a trespasser as against the mortgagor. In other states, the assignment or conveyance, if

[2]This was an equitable suit by the assignee to foreclose the mortgage. The mortgagee-assignor was not made a party. It was held that he was a necessary party and the decree of foreclosure was reversed. Kent, J., gave as his reasons that, the assignment not being absolute but by way of security only, the right of the assignee to the mortgage depended upon there being something still due to him from the assignor, and that, assuming a balance due, the assignor had a right to redeem from the assignee. Radcliff, J., concurred upon the grounds stated by Kent, J., and also upon the ground that "no such assignment has been made to carry the estate at law; that the fee is, therefore, still vested in Green, * * * All the parties before the court are, therefore, possessed of equitable interests only, yet the chancellor has decreed the whole estate to be sold. It is certain that a decree can never affect the interest of a party not before the court."

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in proper form to pass an interest in real estate, is treated as a conveyance of the legal estate, passing to the assignee or grantee, the right of the mortgagee to enter.—2 Wash. Real Prop., § 4, ch. 16. The correctness of the one decision or the other, depends on the theory of a mortgage which may prevail. If it is regarded as a mere security for a debt, a chattel interest, until foreclosure, the mortgagor continuing the real owner of the fee, an assignment of the mortgage or a conveyance by the mortgagee of the premises, not intended, and incapable of operation as a transfer of the debt, may be treated as void, not passing any estate or interest in land. That, however, notwithstanding what is said in Duval v. McLoskey, 1 Ala. 737, is not the theory of a mortgage which the current of our decisions has recognized, and by which they have been controlled. A mortgage is more than a mere security for a debt—it creates a direct, immediate estate in land—a fee simple, unless otherwise expressly limited. The estate is conditional—annexed to the fee is a condition which may defeat it. The mortgage, if in the conveyance there is not a reservation of the possession to the mortgagor, until default in the performance of the condition, has the immediate right of entry, and may eject the mortgagor or his tenants.—Duval v. McLoskey, supra. If the mortgagor is permitted to remain in possession, he is the mere tenant at will of the mortgagee. After the law day, and default in the performance of the condition, at law the estate is absolutely vested in the mortgagee—the fee is freed from the condition annexed to it. Nothing remains in the mortgagor but the equity of redemption, of which courts of law take no notice. Paulling v. Barron, 32 Ala. 11; Barker v. Bell, 37 Ala. 358. Before default, all that remains in him, is the right to perform the condition and thereby restore his original estate. An assignment of the mortgage debt, without an assignment of the mortgage, will not pass the legal estate, that remains in the mortgagee in trust, an equitable security for the payment of the debt. In Center v. P. & M. Bank, 22 Ala. 751, it is said that the mortgage is but an incident and passes in equity to the assignee of the debt. But, the legal estate resides in the mortgagee until the mortgage is assigned. In Graham v. Newman, 21 Ala. 498, it is said, the assignment of a mortgage debt operates in equity an assignment of the mortgage, entitling the assignee to use the name of the mortgagee to enforce the mortgage at law. If not only the debt, but the mortgage also is assigned, the legal title passes to the assignee, and he may at law proceed in his own name. If the mortgage is of land, to pass the legal estate there must be a deed from the mortgagee to the assignee, "either on a separate paper or endorsed on the mortgage deed, with suitable words to convey the thing itself." On a bill to foreclose, the mortgagee in possession having died, the heir to

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whom the legal title has descended is an indispensable party, that the legal title may be bound by the decree.—Huggins v. Hall, 10 Ala. 283. In a court of law nothing less than payment, or something equivalent to payment of the mortgage debt, a release in writing of the mortgage, or a reconveyance, operates a divestiture of the legal estate of the mortgagee.—Barker v. Bell, supra; Powell v. Williams, 14 Ala. 476. It is not settled in this state that payment of the debt after the law day, without reconveyance from the mortgagee, will restore the fee to the mortgagor; and in Collins v. Robbinson, 33 Ala. 91, the court refrained from determining whether after payment the mortgagee not having reconveyed, could maintain ejectment. It is manifest that our decisions have regarded mortgages as of a dual character—a conveyance of an estate in lands—and a security for a debt; bearing one character in a court of law and another in a court of equity. At law it is a conveyance of an estate in lands, with a condition annexed which may defeat it. It comprehends the entire fee, leaving the mortgagor the right, on the performance of the condition, to restore himself to his original estate. This right, as between mortgagor and mortgagee, is not property, but matter of jurisdiction, and if it is not exercised to the day it is lost. In equity it is a security for a debt, passing as an incident with the assignment of the debt, as any security for its payment would pass. The mortgagor has an equity of redemption, a right to perform the condition, on making compensation to the mortgagee, which is regarded as an estate in lands, separate from the legal estate, alienable or transmissible by descent or devise. It would not comport with this theory, now too firmly engrafted in our law to be controverted, to assert that a conveyance by the mortgagee, though not operating an assignment of the mortgage debt, does not pass the legal estate.

However this may be, it can not be doubted that a mortgagee in actual possession, as was John S. Welsh when he conveyed to Nicholas Welsh, may convey to a stranger, and his conveyance, if expressed in proper terms, will pass the possession, enabling the grantee to hold and defend against all who can not show a superior title.—Smith v. Smith, 15 N. H. 55; Wallace v. Goodall, 18 N. H. 439; Hinds v. Ballou, 44 N. H. 619; Givan v. Doe, 7 Blackf. 210. The conveyance employs the statutory words, "grant, bargain, sell," declared when it was made to import an express covenant that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor, and for quiet enjoyment against the grantor, his heirs or assigns.—Clay's Dig. 156, § 31. The operation of this conveyance was to pass not only the present interest of John S. Welsh, the mortgagee, which was an estate in fee simple debased by the quality annexed in its creation, but the pure fee simple accruing

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from the failure of the mortgagor to perform the conditions on the day appointed. Such a conveyance by a mortgagee operates not only a conveyance of the land, but an equitable assignment of the debt, to which the interest of the grantor in the lands may be said to be incidental.—Ruggles v. Barton, 13 Gray, 506; Hunt v. Hunt, 14 Pick. 382; Connor v. Whitmore, 52 Me. 186. If the fee of John S. became perfect at law, freed from the conditions annexed by the failure of the mortgagor to pay the debt, it would have enured to his grantee, and he would have been estopped from setting it up against him. A breach of the covenants of the conveyance can be avoided only by treating it, as it imports to be, a transfer of the grantor's interest in the lands, and of all he had necessary to render the conveyance operative and effectual.

ELLISON v. DANIELS.

SUPREME COURT OF NEW HAMPSHIRE, 1840.
11 N. H. 274.

Writ of Entry, to recover twenty-five acres of land in Barrington, in the county of Strafford.

Plea, *nul disseizin.*

It appeared, that on August 5, 1814, the demandant was seized of the demanded premises in fee, and that on that day he conveyed the same, together with eight acres of other land, to Joseph Ellison, in mortgage, to secure the payment of the demandant's promissory note of even date with the deed of mortgage, and payable to the mortgagee on or before August 1, 1818. Joseph Ellison, on November 30, 1820, executed a deed of the premises to Abraham Ellison, with covenants of warranty, and Abraham Ellison, on March 6, 1826, executed a similar deed of the premises, to the tenant. The tenant offered evidence tending to prove that Joseph Ellison took possession of the twenty-five acres, for the purpose of foreclosing the mortgage. The note was not produced at the trial, and there was no evidence of any transfer, or assignment of it by Joseph Ellison.

The court ruled that whatever right Joseph Ellison acquired by the mortgage, passed, in virtue of said deeds, to the tenant.

A verdict was returned for the tenant, and the counsel for the demandant moved to set the same aside, and for a new trial, for alleged error in said ruling.

WOODS, J. This action is brought by the demandant to recover possession of a tract of land conveyed by him in mortgage to one

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Joseph Ellison, while the mortgage still continues outstanding and in full force.

Upon the facts reported, there can be no pretense that the mortgage has been foreclosed as to the lands in question. Under our statute, no possession, short of a peaceable and continued actual possession, for one year after entry, can operate a foreclosure of a mortgage. N. H. Laws 486. It does not appear that Joseph Ellison, the mortgagee, was ever in the actual possession of the twenty-five acres of land claimed in this suit. The question of actual possession by Joseph Ellison was not submitted to the jury, nor is the fact found by the case, upon the concession of the parties. That fact was controverted, but not determined.

Two questions properly arise upon the case.

1. Can the demandant, who is the mortgagor of the premises sought to be recovered, maintain the action while the mortgage remains in force, against even a stranger to the title in possession?

2. Is the tenant a stranger to the mortgage title, or is he assignee thereof?

* * * * * * *

Upon the authorities cited, the doctrine would seem to be fully established, that, as against all strangers to the title of the mortgagee, the mortgagor is at law the owner, and is seized of the estate mortgaged, and may maintain a real action for the recovery thereof, while the mortgage is still a subsisting mortgage; and that no stranger to the mortgage will be permitted to set up such outstanding mortgage, without entry or foreclosure of the mortgage by the mortgagee or his assigns, to defeat the seizin and recovery, on the part of the mortgagor.

This brings us to the question, and makes it important to enquire, whether the tenant is, upon the facts reported, a mere stranger to the mortgage interest of Joseph Ellison, or was in fact the assignee thereof?

To a proper solution of this question, it is not unimportant to ascertain the nature, character, and extent of the interest of Ellison, the mortgagee, in virtue of his mortgage.

At law, by the mortgage, a conditional estate in fee simple vests in the mortgagee. Dexter v. Harris, 2 Mason 531.

And a real action may be maintained by a mortgagee, to recover possession of the mortgaged premises. Estabrook v. Moulton, 9 Mass. 258.

And in Southerin v. Mendum, 5 N. H. 420, it is said, that a mortgage in fee passes to the mortgagee, as between him and the mortgagor, all the estate in the land; and he may maintain trespass, or a writ of entry, against any one who may disturb his possession, even against the mortgagor himself.

And so far as it may be necessary, to enable the mortgagee to

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prevent waste, and to keep the land from being in any way diminished in value, or to receive the rents and profits, and, in short, to give him the full benefit of the security, and appropriate remedies for any violation of his rights, he is undoubtedly to be treated as the owner of the land. Southerin v. Mendum, and authorities there cited. Glass v. Ellison, 9 N. H. Rep. 69. (Ante 55, Smith v. Moore.)

In all other respects, and for all other purposes, the interest of the mortgagee is treated as a mere personal chattel.

* * * * * * *

The right of the mortgagee to have his interest treated as real estate, extends to, and ceases at the point, where it ceases to be necessary to enable him to protect and to avail himself of his just rights, intended to be secured to him by the mortgage.

To enable the mortgagee to sell and convey his estate, is not one of the purposes for which his interest is to be treated as real estate. There is no necessity that it should be so treated for that purpose. That can be equally well effected in the usual way of assigning and transferring the debt secured by the mortgage. The mortgagee is secured, and fortified in all his rights, without the adoption of any such principle, and the plain purposes of a mortgagee forbid it. The object of the mortgage is the security of the debt; and it is obvious reason, that he only who controls the debt should control the mortgage interest.

The right of Joseph Ellison, then, in the premises in question, for the purpose of sale or transfer, was a mere personal chattel, incident to, inseparable from, and capable of being transferred only in connection with the note by virtue of an assignment thereof.

And the question is, whether that right passed to the tenant, in virtue of the conveyances from Joseph to Abraham Ellison, and from Abraham to the tenant. Did the note pass by force of those deeds?

The deeds from Joseph to Abraham Ellison, and from Abraham Ellison to the tenant, were deeds, with covenants of warranty, purporting to convey the lands described in the mortgage deed of the demandant to Joseph Ellison. The deeds did not in terms import a transfer of the note secured by the mortgage, nor from the deeds alone could it be ascertained that the note described in the mortgage ever had existence. If in terms, then, there was no assignment, or transfer of the note, the further question arises, whether the deeds did not in legal effect operate an assignment of the note.

* * * * * * *

Ch. J. Richardson, in delivering the judgment of the court in Bell v. Morse, 6 N. H. Rep. 205, holds this language: "It appears that the tenant is in possession under a title derived from Thomas Morse. But Thomas Morse was only a mortgagee when

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he conveyed to the tenant. We have no doubt that, under certain circumstances, a conveyance of the land by the mortgagee will pass the debt secured by the mortgage. But there are certain cases in which a deed of the land by the mortgagee will pass nothing. Thus, where a note is secured by a mortgage, if the mortgagee has transferred it he cannot afterwards convey the land. And we are of opinion, that it is not enough to show a deed from a mortgagee, in order to prove that the land passed, but it must be made to appear that the debt passed to the grantee—at least, it must appear that the mortgagee had a right to transfer the debt to the grantee. As no account is given of the debt secured by the mortgage in this case, we think that the tenant is not entitled to hold the land against the demandant."

This case is directly in point, and to the effect that nothing passed by the deed of Joseph Ellison to Abraham, and consequently nothing to the tenant by Abraham's deed. In this case, as in Bell v. Morse, it did not appear that there had been a transfer of the note by the mortgagee prior to the date of the deed to the grantee of the mortgagee. In fact, no account was given in either case of any disposition made of the notes by the mortgagees. The point of the decision in Bell v. Morse, is, that a deed alone of the mortgagee, importing a conveyance of the land, does not pass the debt secured by the mortgage. It would seem, however, fairly to be inferred from the language of the opinion, that if it had appeared that Thomas Morse had had the control of the debt at the date of his deed to the tenant, that the debt would have passed by the deed; that the control of the debt is one of the circumstances under which it seemed to be the impression of the court, that a deed of the land would also pass the debt.

* * * * * * *

Whether proof of the fact of the possession of the note by Joseph Ellison, at the date of his deed, to Abraham, would have given effect to that deed, so as to pass the debt and the mortgage interest, need not now be determined.

Upon the authorities cited, and the facts of this case, we think it entirely clear, that nothing passed by the deed of Joseph to Abraham Ellison, or by the deed of Abraham to the tenant. The tenant, then, was a mere stranger to the mortgage title and had no interest therein.

The instruction, therefore, to the jury, that the interest of Joseph Ellison did pass to the tenant, was incorrect.

New trial granted.

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MERRITT v. BARTHOLICK.

COURT OF APPEALS OF NEW YORK, 1867.
36 N. Y. 44.

PARKER, J. If the delivery of the mortgage, without the bond, to Wentworth, as collateral security for the debt which such delivery was intended to secure, operated as a valid assignment of the mortgage to Wentworth, the judgment below is wrong and cannot be sustained. On the other hand, if it conveyed no interest in the mortgage to Wentworth, then the defendant, who claims his title through Wentworth's foreclosure of that mortgage has no defense to the plaintiff's action to foreclosure, and no interest in respect to it, which, under the facts found by the referee, can avail him upon this appeal.

The single question for consideration then, is, did the delivery of the mortgage by Merritt, the mortgagee, to Wentworth, under the circumstances stated in the referee's report, operate to invest Wentworth with any interest in the mortgage?

The referee finds that, "On the 16th of July, 1853, or shortly thereafter, the bond and mortgage were assigned by the obligee and mortgagee therein named, to John Campbell, by assignment in writing, which was duly acknowledged and recorded on the 16th day of May, 1853. That prior to the assignment of said bond and mortgage to said Campbell, the mortgagee was indebted to Henry T. Wentworth in the sum of $200, borrowed money; that Wentworth desired that said mortgage should be left with him as collateral security for said debt, and that the said Merritt delivered the said mortgage to said Wentworth, according to such request, and as collateral security for said debt of $200; that the said mortgage was so delivered to the said Wentworth before the same was assigned to said Campbell, but that the bond accompanying the same was not delivered to the said Wentworth at the time, nor was anything said about the same, nor is there any evidence that the same was ever delivered to said Wentworth, nor was there any writing executed in reference to such transfer."

As a mortgage is but an incident to the debt which it is intended to secure (Martin v. Mowlin, 2 Burr., 969; Green v. Hart, 1 Johns., 580; Jackson v. Blodget, 5 Cow. 202; Jackson v. Bronson, 19 Johns. 325; Wilson v. Troup, 2 Cow., 231; Cooper v. King, 17 Abb., 342), the logical conclusion is, that a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it. The security cannot be separated from the debt and exist independently of it. This is the necessary legal conclusion, and recognized as the rule by a long course of judicial decisions. (See cases cited above; also, 4 Johns., 41; 5 Johns. Ch. 570; 9 Wend., 80.)

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Unless then, the bond was, in effect, assigned with the mortgage, Wentworth obtained no interest in the mortgage. Did the bond or the debt which it evidenced pass to Wentworth? In the first place, the transfer of the mortgage did not of itself operate to transfer the bond, for the legal maxim is, the incident shall pass by the grant of the principal, but not the principal by the grant of the incident. So that unless we are authorized to say, that such was the intent of the parties, we cannot hold that it did. This is a question of fact, which the counsel for the appellant argues in his points, but unless the referee has found it, as a fact, or found facts from which we are bound to infer its existence, it is a question not in the province of this court to determine. The act done by Merritt, the mortgagee, was the delivery of the mortgage to Wentworth, and the purpose of the delivery was to secure the payment of the debts of the mortgagee to Wentworth. Does it necessarily follow that the intention of the parties was to transfer the bond? The referee has not found either way upon this question of intent, and therefore, unless the intent in question is to be inferred, as a matter of legal necessity from what he does find, it must now be held not to have existed.

If the transfer had been by a written assignment, describing the mortgage alone, and expressing the object to be to secure the debt of the assignor to the assignee, nothing being said about the bond or the debt which it represents, and delivery of the mortgage made, it would be impossible, I think, to hold that the intention was to assign the bond. There would be no opportunity for an implication to that effect. The circumstance that the assignment would be inoperative, unless the bond is held to pass, would not give the assignment that effect. The result of such holding would be to reverse the maxim, and make the principal follow the incident. To make the circumstance of its inefficiency a reason for giving it the effect desired, would, manifestly, uproot the maxim, and establish the contrary rule.

The fact that here the transfer was by manual delivery, merely, nothing being said as to the bond, or the indebtedness secured by it, does not afford any stronger evidence of intent to transfer the bond than the case supposed. There is no circumstance in the case not considered in the supposed case, and, as I think, nothing to compel the inference of intent to transfer the bond. I am unable to see, therefore, any escape from the conclusion, that, upon this appeal, the judgment of the Supreme Court must be held correct, and affirmed.[3]

Davis, Ch. J., and Porter, Bockes, and Scrugham, JJ., concurring.

Hunt and Grover, JJ., for reversal.

[3]Compare Stewart v. Crosby and Ladue v. D. & M. R. Co., supra. See also, Barrett v. Hinkley, 124 Ill. 32; Woods v. Woods, 66 Maine

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MATTHEWS v. WALLYN.

COURT OF CHANCERY OF ENGLAND, 1798.
4 Vesey, 118.

The Lord Chancellor (LOUGHBOROUGH). In this cause the question was only, whether the assignee of a mortgage had a right to be paid according to the sum that appeared due upon the mortgage deed, whatever might be the state of the account between the mortgagor and mortgagee. The circumstances had nothing in them so particular as to vary at all the general question. Matthews had created a mortgage, upon which Shephard had advanced money; and Shepheard being his attorney, the purpose of creating the mortgage was, that money might be raised for the use of Matthews. Shepheard ought not to have made any use of the mortgage, but for the purpose, for which it was created: namely, to raise money for Matthews: but he thought fit to assign the mortgage without the privity of the mortgagor; and the assignee now claims to hold the mortgage to the full extent of the sum appearing due upon the face of the deed.

When the cause came on before me, a case was referred to, in which, it was supposed, Lord Thurlow had entertained an idea, but not decided, that a mortgagor having permitted the mortgage deed without any endorsement upon it to be in the possession of the mortgagee, an assignee taking from that mortgagee might have a right to hold that mortgage to the full extent of it against the mortgagor, who permitted the mortgagee to deal with and to make a security upon it. It was also supposed, that in practice there is no occasion to make the mortgagor a party; and in some cases it may not be possible to make him a party to the assignment; and that to hold, that the assignee of a mortgage is bound to settle the accounts of the person from whom he takes the assignment, would tend to embarrass transfers of mortgages. I have got all the information I could; and I think I have got the best. The result is, that persons most conversant in conveyancing hold it extremely unfit, and very rash, and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor, as to the sum really due; that in fact it does happen that assignments of mortgages are taken without calling upon the mort-

206; Lunt v. Lunt, 71 Maine 377; Ruggles v. Barton, 13 Gray (Mass.) 506; Morris v. Bacon, 123 Mass. 58; Hilton v. Woodman's Estate, 124 Mich. 326; Kernohan v. Manss, 53 Ohio St. 118.

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gagor; but that the most usual case where that occurs is where it is the best security that can be got for a debt not otherwise well secured; and it is not in the course of transferring mortgages, but of raising money upon such securities; but no conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party, and being satisfied, that the money was really due.

* * * * * * *

Considering the general principles upon which this court acts with regard to mortgages, I have no difficulty in deciding the point. It is true there is a legal estate or term; but it must be apparent upon the face of the title that it is not an absolute conveyance of the term or legal estate, but as a security for a debt; and the real transaction is an assignment of a debt from A. to B., that debt collaterally secured by a charge upon a real estate. The debt therefore is the principal thing; and it is obvious that if an action was brought upon the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond: if an action of covenant was brought by the covenantee, the account must be settled in that action. In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment.

Therefore the plaintiff must be at liberty to redeem, upon payment of what the master shall find due upon the original mortgage from him to Shepheard.[4]

BAILEY v. SMITH.

SUPREME COURT OF OHIO, 1863.
14 Ohio St. 396.

RANNEY, J. On the 8th day of October, 1853, the plaintiff gave to the defendant, Charles H. Bolles, his negotiable promissory note for the sum of $5,370, and payable two years after date, with interest. Prior to the 14th of December, in the same year, sundry payments had been made and indorsed thereon, leaving then due the

[4] In the course of the argument, the Chancellor said, "It struck me at first that it was quite different from the case of the bond; for that is not assignable at law. A mortgage is a conveyance of a legal estate; though this court only holds it a security: for what? For the money that upon the face of the mortgage appears to be due."

Compare, First National Bank v. Stiles, 22 Hun (N. Y.) 339; Davis v. Bechstein, 69 N. Y. 440.

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sum of $2,500; and on that day, the plaintiff executed and delivered a mortgage upon real estate situated in Lorain county to secure this balance. On the 9th of June, 1856, he filed his amended petition against Bolles, the original payee of the note—Kendall and Lucas, through whose hands the note and mortgage had passed by assignment, and Smith, the then holder—to compel the delivery and cancellation of these instruments; alleging that the note was given for a pretended patent right for a machine, which was utterly worthless, whether patented or not; that both the note and mortgage were obtained by fraud; and that every subsequent holder thereof took them with full notice of the fraud and want of consideration.

* * * * * * *

The plaintiff obtained the relief demanded in his petition for everything beyond the amount paid by Smith for the note and mortgage, with interest thereon; and for that amount, an affirmative judgment for the sale of the mortgaged premises was rendered in favor of Smith, and the plaintiff was ordered to pay the costs of the action.

This judgment was founded upon a finding by the court, that the note was obtained by fraud, and without consideration, of which the intermediate parties, Kendall and Lucas, had notice, and that, as against them and Bolles, the plaintiff was entitled to the relief prayed for in his petition; but the court further find, that Smith purchased the note and mortgage from Lucas in September, 1855, and paid therefore $1,250, without knowledge of the fraud and want of consideration existing between the original parties, and is entitled to hold the mortgage for the sum so paid with interest, and to recover thereon for that amount. Passing by, without any remark, the objection that this affirmative judgment in favor of Smith, could not have been rendered without a distinct counterclaim interposed by him, and coming, at once, to the merits of the controversy, it is evident, that the judgment can only be supported upon the establishment of the two propositions: First, that upon the facts found by the court, taken in connection with his answer asserting his title, the defendant, Smith, in the sense of the commercial rule, was a bona fide holder of the note, without notice of the equities existing between the original parties; and, second, that the immunity belonging to the note in the hands of such a holder, in virtue of this rule, is extended to the mortgage by which it was originally secured, and equally entitles the holder to recover upon that.

[His honor here considered the first point and came to the conclusion that there was no error in the finding of the District Court that Smith was a bona fide holder of the note.]

The remaining question is one of much importance, and for the

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first time presented in this court. As it was supposed to be involved in other cases upon our docket, we have given opportunity to counsel in those cases to be heard, and after full argument, we have bestowed upon it very careful attention. Does the fact that a note, obtained by fraud, has passed into the hands of a bona fide indorsee, entitle him to enforce a mortgage, given to the original holder, to secure its payment? Or may the mortgagor still insist upon the fraud, as a defense to an action brought to foreclose it? On the one hand, the question is in no way affected by the further question, whether a mortgagee acquires such an interest in the land as to enable his grantee, being also assignee of the note, by deed duly executed, to claim the benefit of the rule which protects bona fide purchasers of real estate—there being no claim that any such deed was made. And on the other, we assume, as undoubted, that, whether a written assignment was made or not, the assignee of the note acquired all the rights and interests of the assignor, in the mortgage. Very little aid is to be derived, either from adjudged cases or the elementary books, in the solution of the precise question now before us. This is not because the purchase and assignment of mortgages is a new thing. On the contrary, scarcely any business transaction has been more common and familiar, or has oftener engaged the attention of the courts. Nor has the nature of this instrument, and the rights of parties growing out of its assignment, either alone or in connection with a non-negotiable security, escaped attention, or failed to receive very full and accurate illustration. In such case, the universally acknowledged doctrine, from the case of Davies v. Austin, 1 Ves. 247, to Bush v. Lathrop, 22 New York R. 535, has been, that it is to be regarded as a chose in action, and, as expressed by Lord Thurlow, "the purchaser must abide by the case of the person from whom he buys;" but during all that long period, neither in England, nor in any of the old states of the Union, does the question seem to have been presented, whether it might not have a different effect upon its assignment, when made to secure a negotiable instrument. This may be accounted for, in part, undoubtedly by the general practice of taking a non-negotiable bond with a mortgage; but it cannot be doubted that mortgages have many times been taken to secure negotiable bills and notes, fraudulently transferred, and if such a distinction was thought to exist, it seems very singular that the holders should never have made the attempt to avail themselves of such securities. In New York, the attempt has been frequently made to confine the principle, that the purchaser must abide by the case of the seller, to the original debtor, allowing him to make the same defense against the assignee that he could against the assignor, but protecting the assignee, without notice, from what have been denominated latent equities, or inter-

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ests in third persons, not in the apparent chain of title. And this for the very plausible reason, that one proposing to purchase such an instrument, might inquire of the debtor whether he pretended to any defense, and make his answer estop him from afterward asserting any, but that no amount of diligence would enable him to protect himself from such latent equities. But after some vacilla tion in judicial opinion, the court of appeals, in Bush v. Lathrop, repudiated the distinction, and held, that the purchaser, in such cases, must rely upon the good faith of the seller, that he could "take only such title as the seller had and no other," and that if mortgages were "to be further assimilated to commercial paper, the legislature must so provide."

But the direct question arising upon mortgages given to secure negotiable paper, has arisen in two of the new states of the west, whose courts are entitled to high respect for their learning and ability, and it has there been held, that the quality of negotiability is so far imparted to such mortgages, as to make them available in the hands of a bona fide indorsee of the paper, without any regard to the equitable rights of the original parties. Reeves v. Sently, Walker's Ch. Rep. 248; Dutton v. Ives, 5 Michigan Rep. 515; Fisher v. Otis, 3 Chand. Rep. 83; Martineau v. McCollum, 4 Id. 153; Croft v. Bunster, 9 Wisconsin Rep. 503. In the first of these cases, decided by the chancellor of Michigan, in 1843, no reasons are assigned, or authorities cited; and in Dutton v. Ives, decided by the Supreme Court, in 1858, the doctrine is again advanced upon the authority of Reeves v. Sentley, and the two Wisconsin cases, reported in 3 and 4 Chandler. On referring to the first case decided in that state (Fisher v. Otis), we find it professedly based on authority, and it serves to show upon what a slender foundation, a line of decisions may be made to rest. The court say: "This doctrine is sustained by respectable authorities, and by the reason and sound policy which have long ruled in relation to commercial paper;" and Powell on Mortgages, 908, and note are cited. Mr. Powell certainly did suggest the question, whether such a distinction might not be made. His exact position is thus stated by Mr. Coventry in the note: "When it is said that a debt is not assignable at law, it must be understood with this restriction, that if it be secured by a negotiable instrument, such as a bill of exchange, the legal interest will pass by indorsement, and this has induced the learned author, in the next paragraph of the text, to suggest, whether, in such a case, the rule as to the mortgagee's liability would apply." The rule here referred to, is that announced by Lord Loughborough, in the leading case of Matthews v. Wallyn, 4 Ves. 126, that the assignee of a mortgage takes it subject to all equities which could be asserted against his assignor. Now, it may be fairly assumed, that Mr. Powell sup-

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posed that such a distinction could be judiciously made; but it must be admitted that he had then no authority to base it upon, that neither the judicial records of England, nor of any of the old states, furnish any evidence that it has ever been adopted, and that it was first acted upon, nearly half a century after the suggestion was made, by a new state upon another continent. Under such circumstances, it cannot be reasonably claimed, that we are at liberty to regard it as an established principle, and we can only adopt it when we are convinced that it is correct in principle, and consistent with the analogies of the law. The reasons for supposing it to be so, are well stated in the case of Croft v. Bunster, 9 Wis. Rep. 510. The reason assigned, it is said, why the assignee can recover no more in equity than is actually due from the mortgagor to the mortgagee, is, that he could recover no more at law on the bond or covenant, and the reason ceasing as to negotiable securities, the rule also ceases to have application; that the debt is the principal thing, and the mortgage the mere incident, following the debt wherever it goes, and deriving its character from the instrument which evidences the debt. To which may be added, the consideration pressed upon our attention in argument, that, if a recovery may be had for the debt, the mortgagor can have no interest in withdrawing the mortgaged property from liability to satisfy it. This last position is easily disposed of. If it were true, it would furnish no authority for changing the legal character and incidents of the mortgage deed, and, it is evident, that other lienholders would often have a deep interest in the question. But it is not true as to the mortgagor. The right to dispose of property at the will of the owner, and to pay honest debts instead of those tainted with fraud, are valuable privileges, of which he should not be deprived without a necessity exists; and a decree upon the mortgage would very often deprive him of the benefits of the homestead law, which could not be effected by a judgment upon the fraudulent note. It is very evident also, that the wife of the mortgagor, in a large majority of cases, might have a deep interest in the solution of this question. Wholly incapable of becoming a party to any commercial contract whatever, she may nevertheless convey her estate, or release her dower, by way of mortgage for the security of her husband's negotiable paper. If the mortgage is to be deemed negotiable in the hands of an assignee of the paper, we see no escape from the conclusion, that the mortgage must be enforced against her, however gross and palpable the fraud may be, by which it was obtained.

In a general sense, it may be very well and very correct, to speak of a mortgage as an incident to the debt it is created to secure; but the importance of this mere term may be easily overrated. It certainly is not one of the incidental effects of the crea-

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tion of the debt itself, and it can only be made to have relation to the debt by the force of the contract contained in the mortgage; and is incident to the debt only in the same sense, that every independent contract, having for its object the payment or better security of the debt, is incidental to it. The existence of the debt, is the occasion out of which they arise, and the subject of their various provisions; but they embrace all the elements of a perfect contract in themselves, and are enforced by appropriate remedies, according to their own stipulations. At law, a mortgage effects the conveyance of an estate upon condition, but in the view of a court of equity, where alone the rights of an assignee can be enforced, it is a chose in action, having no negotiable quality, and not differing in character from collateral personal agreements, designed to effect the same object. Any of these collateral agreements may be entered into for the purpose of securing a debt, evidenced by a negotiable instrument; and if they are not obtained by fraud, and rest upon a sufficient consideration, in the absence of any agreement to the contrary, they undoubtedly enure in equity to the benefit of any owner of the debt. But the question here is, whether one of these collateral agreements, made to secure a negotiable note, loses its character of a mere chose in action, and has imparted to it the qualities of negotiability, so that upon the transfer of the note, it may be enforced, although obtained by fraud? This question has been repeatedly answered, in respect to a class of collateral agreements, much more intimately connected with the negotiable instrument, than is the mortgage deed. We refer to guarantees indorsed upon the note itself. Passing by those which have been claimed to be such, but held by the courts to be mere indorsements, or original contracts, with apt words of negotiability incorporated in them, the universal doctrine has been, that the legal title does not pass upon the transfer of the note; that they are mere non-negotiable choses in action, and to be treated, in every respect, as such. Lamorieux v. Hewit, 5 Wend. 307; McLaren v. Watson's Executors, 26 Wend. 425; Miller v. Gaston, 2 Hill, 188. In the first of these cases, Chief Justice Savage says: "Promissory notes are negotiable only by virtue of the statute, but this negotiable quality is not extended to any other instrument relating to the note;" and Bronson, J., in the last, in support of the same position, says: "But the guarantee itself is not a negotiable instrument, and can not be transferred to a third person so as to give him a legal title to proceed in his own name against the guarantor. As in the case of other contracts which are not in their own nature assignable, the remedy upon a guarantee is confined to the original parties to the instrument." We have said that these instruments are much more intimately connected with the note, than is a mortgage deed. This will be apparent when it is remembered, that the

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one ordinarily guarantees the particular instrument specified in it, and does not survive a renewal or other change of the evidence of indebtedness; while the other secures the debt, whatever changes may intervene, until it is paid; and, even a positive statutory bar which precludes a recovery upon the note, it has been held, does not prevent the enforcement of the mortgage. Fisher v. Mossman, 11 Ohio. St. Rep. 42.

In order to sustain the judgment rendered in this case, it is indispensably necessary to affirm—either, that the mortgage, when made to secure a negotiable note, contrary to its general nature and qualities, becomes a negotiable instrument, or, that the transfer of such a note, without the aid of any statute, or of any judicial decision, except those of very recent date, has an effect beyond the note itself, and draws after it, and within one of the most important incidents of negotiability, a collateral contract having relation to the same debt. A very careful consideration of the whole subject, has convinced us that we have no power to do either; and that neither justice nor public policy would be promoted by making the attempt. It certainly has never been thought to be within the province of a court, to determine what instruments should be taken from the list of mere choses in action, and clothed with the attributes of negotiability. Bills, foreign and inland, assumed this position upon the immemorial custom of merchants, and were adopted into the law, upon the reasons which availed to make up the great body of the common law. But the statute, third and fourth Anne, was found necessary to place promissory notes upon the same footing; and from that day to this, neither in England nor in this country has an instrument been added without express legislative sanction. Indeed, this could not well be otherwise. The necessities of commerce, and the instruments best calculated to answer its purposes, must all be considered before any intelligent decision could be made. These are legislative functions requiring experience and extensive information, and calling for the exercise of a discretion, wholly incompatible with the fixed certainty of judicial decision. But if it were otherwise, and the discretion rested with us, we could not introduce the mortgage deed into the list of negotiable instruments, without disregarding the very foundation principles upon which such paper has always been supposed to rest. From the case of Miller v. Race, 1 Burr. R. 452, to the very latest case in our own reports, the language of the courts has been uniform, that such paper is only allowed in the interests of commerce, and "possessing some of the attributes of money," to answer the purposes of currency. Lord Mansfield, in answer to the "ingenious" argument of Sir Richard Lloyd, that the plaintiff could take nothing by assignment from a thief who had stolen the paper, said the fallacy of the argument consisted

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in comparing bank notes to what they did not resemble. "They are not goods," he said, "not securities, nor documents for debt, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind;" "the course of trade creates a property in the assignee or bearer," and they cannot be recovered "after they have been paid away in currency, in the usual course of business." This was said, it is true, of bank notes; but the same principles, and for the same reasons, were afterward applied by the same learned judge, to every description of negotiable paper, and the case of Miller v. Race is still the leading authority upon this branch of commercial law.

Now, mortgages are not necessities of commerce, they have none of the "attributes of money," they do not pass in currency in the ordinary course of business, nor do any of the prompt and decisive rules of the law merchant apply to them. They are "securities," or "documents for debts," used for the purpose of investment, and unavoidably requiring from those who would take them with prudence and safety, an inquiry into the value, condition and title of the property upon which they rest; nor have we the least apprehension that commerce will be impeded by requiring the further inquiry of the mortgagor, whether he pretends to any defense, before a court will foreclose his right to defend against those which have been obtained by force or fraud.

Against any amount of mere theory, advanced to sustain the position that commerce requires these instruments to be invested with negotiable qualities, may be successfully opposed the stubborn fact, that in the first commercial country of the world, as well as in the great commercial states of the American Union, they have never been used for such purposes, or heard of in such a connection. It is quite immaterial whether this has arisen from the cause supposed—that they are never made to secure negotiable paper—or not; since it equally shows that no necessity for their use has ever been felt. A long experience has demonstrated, that they are not necessary instruments of active trade and business; and we but follow in the footsteps of the ablest and wisest judges, when we say, that the harsh rule which excludes equities, and often does injustice for the benefit of commerce, should not be applied to them. This remits them to the position they have so long occupied—that of mere choses in action; and whether standing alone, or taken to secure negotiable or non-negotiable paper, they are only available for what was honestly due from the mortgagor to the mortgagee. If they are assigned, either expressly or by legal implication, the assignee takes only the interest which his assignor had in the instrument—acquires but an equity, and upon the long-established doctrine in courts of equity, is bound to sub-

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mit to the assertion of the prior equitable rights of third persons. To hold otherwise, is to engraft legal incidents upon a mere equitable title; to give to the transfer of negotiable paper an effect beyond what it imports, or is necessary in the accomplishment of its legitimate purposes; and, finally, to invest with negotiable qualities a class of instruments, neither used for, nor adapted to, the trade and commerce of the country, and thereby to deprive the mortgagor of the just right of defending against fraud, without subserving any public policy whatever.

These views necessarily lead to the conclusion, that, upon the facts found in the court below, the plaintiff was entitled to have his title cleared from the incumbrance of this fraudulent mortgage, and that the court erred in giving the affirmative judgment of foreclosure in favor of Smith. For this error, that judgment is reversed, and the cause remanded for further proceedings.

Peck, C. J., and Brinkerhoff, Scott and Wilder, JJ., concurred.

CARPENTER v. LONGAN.

SUPREME COURT OF THE UNITED STATES, 1872.
16 Wall. (U. S.) 271.

Mr. Justice SWAYNE stated the case, and delivered the opinion of the court.

On the 5th of March, 1867, the appellee, Mahala Longan, and Jesse B. Longan, executed their promissory note to Jacob B. Carpenter, or order, for the sum of $980, payable six months after date, at the Colorado National Bank, in Denver City, with interest at the rate of three and a half per cent. per month until paid. At the same time Mahala Longan executed to Carpenter a mortgage upon certain real estate therein described. The mortgage was conditioned for the payment of the note at maturity, according to its effect.

On the 24th of July, 1867, more than two months before the maturity of the note, Jacob B. Carpenter, for a valuable consideration, assigned the note and mortgage to B. Platte Carpenter, the appellant. The note not being paid at maturity, the appellant filed this bill against Mahala Longan, in the District Court of Jefferson County, Colorado Territory, to foreclose the mortgage.

She answered and alleged that when she executed the mortgage to Jacob B. Carpenter, she also delivered to him certain wheat and flour, which he promised to sell, and to apply the proceeds to the payment of the note; that at the maturity of the note she had tendered the amount due upon it, and had demanded the return ot

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the note and mortgage and of the wheat and flour, all of which was refused. Subsequently she filed an amended answer, in which she charged that Jacob B. Carpenter had converted the wheat and flour to his own use, and that when the appellant took the assignment of the note and mortgage, he had full knowledge of the facts touching the delivery of the wheat and flour to his assignor. Testimony was taken upon both sides. It was proved that the wheat and flour were in the hands of Miller & Williams, warehousemen, in the city of Denver, that they sold, and received payment for, a part, and that the money thus received and the residue of the wheat and flour were lost by their failure. The only question made in the case was, upon whom this loss should fall, whether upon the appellant or the appellee. The view which we have taken of the case renders it unnecessary to advert more fully to the fact relating to the subject. The District Court decreed in favor of the appellant for the full amount of the note and interest. The Supreme Court of the Territory reversed the decree, holding that the value of the wheat and flour should be deducted. The complainant thereupon removed the case to this court by appeal.

It is proved and not controverted that the note and mortgage were assigned to the appellant for a valuable consideration before the maturity of the note. Notice of anything touching the wheat and flour is not brought home to him.

The assignment of a note underdue raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was non-negotiable, or had been assigned after maturity. The question presented for our determination is, whether an assignee, under the circumstances of this case, takes the mortgage as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. The contract as regards the note was that the maker should pay it at maturity to any bona fide indorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfilment of that contract. To let in such a defense against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently in good faith, became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who "puts trust and confidence in the deceiver should be a loser rather than a stranger."

Upon a bill of foreclosure filed by the assignee, an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. Here the amount due was the face of the note

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and interest, and that could have been recovered in an action at law. Equity could not find that less was due. It is a case in which equity must follow the law. A decree that the amount due shall be paid within a specified time, or that the mortgaged premises shall be sold, follows necessarily. Powell, cited supra, says: "But if the debt were on a negotiable security, as a bill of exchange collaterally secured by a mortgage, and the mortgagee, after payment of part of it by the mortgagor, actually negotiated the note for the value, the indorsee or assignee would, it seems, in all events, be entitled to have his money from the mortgagor on liquidating the account, although he had paid it before, because the indorsee or assignee has a legal right to the note and a legal remedy at law, which a court of equity ought not to take from him, but to allow him the benefit of on the account."

A different doctrine would involve strange anomalies. The assignee might file his bill and the court dismiss it. He could then sue at law, recover judgment, and sell the mortgaged premises under execution. It is not pretended that equity would interpose against him. So, if the aid of equity were properly invoked to give effect to the lien of the judgment upon the same premises for the full amount, it could not be refused. Surely such an excrescence ought not to be permitted to disfigure any system of enlightened jurisprudence. It is the policy of the law to avoid circuity of action, and parties ought not to be driven from one forum to obtain a remedy which cannot be denied in another.

The mortgaged premises are pledged as security for the debt. In proportion as a remedy is denied the contract is violated, and the rights of the assignee are set at naught. In other words, the mortgage ceases to be security for a part or the whole of the debt, its express provisions to the contrary notwithstanding.

The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.

It must be admitted that there is considerable discrepancy in the authorities upon the question under consideration.

In Bailey v. Smith et al.—a case marked by great ability and fullness of research—the Supreme Court of Ohio came to a conclusion different from that at which we have arrived. The judgment was put chiefly upon the ground that notes, negotiable, are made so by statute, while there is no such statutory provision as to mortgages, and that hence the assignee takes the latter as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder. To this view of the subject there are several answers.

The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.

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If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.*

In Pierce v. Faunce, 47 Maine 513, the court say: "A mortgage is *pro tanto* a purchase, and a bona fide mortgagee is equally entitled to protection as the bona fide grantee. So the assignee of a mortgage is on the same footing with the bona fide mortgagee. In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects."

Matthews v. Wallyn is usually much relied upon by those who maintain the infirmity of the assignee's title. In that case the mortgage was given to secure the payment of a non-negotiable bond. The mortgagee assigned the bond and mortgage fraudulently and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The Lord Chancellor was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which would be applied to the bond if standing alone. He finally came to a different conclusion, holding the mortgage to be a mere security. He said, finally: "The debt, therefore, is the principal thing; and it is obvious that if an action was brought on the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, the account must be settled in that action. In this court the condition of the assignee

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cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment." The principal is distinctly recognized that the measure of liability upon the instrument secured is the measure of the liability chargeable upon the security. The condition of the assignee cannot be better in law than it is in equity. So neither can it be worse. Upon this ground we place our judgment.

We think the doctrine we have laid down is sustained by reason, principle, and the greater weight of authority.

Decree reversed, and the case remanded with directions to enter a decree in conformity with this opinion.[5]

FOSTER v. CARSON.

SUPREME COURT OF PENNSYLVANIA, 1894.
159 Pa. St. 477.

Scire facias sur mortgage.

Opinion by Mr. Chief Justice STERRETT, Jan. 22, 1894: On the trial of this *scire facias*, it appeared among other things that the mortgage in suit was executed and delivered by the defendant

[5] "Conceding, then, that a mortgage given as security for a negotiable note, which refers to it, may partake of the negotiable character of the latter, the rule should be limited by the proposition that when the terms of the mortgage so affect the note as to render it uncertain in amount, or in time of payment, or ingraft upon it conditions as to the payment of the amount, it takes away the negotiable character of the note, and leaves its owner or purchaser in the same position as the owner or purchaser of any other chose in action. No good reason is suggested for a contrary rule. If a negotiable note is 'a courier without luggage' that passes from hand to hand, and choses in action, which are burdened with uncertainties and conditions, are not, why should the courier who carries his luggage in a trunk be held to be not excluded from the negotiable class because he has no hand baggage? If it be said that the general usage justifies it, we should at least be able to find cases in the books which support such general usage. Yet it is confidently believed that such cannot be found where the language of the mortgage goes beyond provisions for the collection of the security, and undertakes to increase, diminish, or place conditions upon the obligations of the parties, thereby rendering the instrument uncertain." Hooker, J., in Brooke v. Struthers, 110 Mich. 562. Compare, Wilson v. Campbell, 110 Mich. 580.

"It was urged that the note in question here, although payable to order, and without contingency, on a day certain, was not negotiable, because it purported to be according to the condition of a mortgage. But, as the terms of the mortgage correspond with those expressed in the note, there is nothing to affect its negotiability." Campbell, J., in Littlefield v. Hodge, 6 Mich. 326.

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Agnes J. Carson to Mary Speelman, who assigned the same, on the margin of the record thereof, to A. C. Jarrett: of which assignment the mortgagor had actual notice. The bond accompanying the mortgage was also assigned, by indorsement thereon, to said Jarrett, and a certificate of no defense, executed and acknowledged March 28, 1888, was delivered to him. On May 22, 1888, said Jarrett assigned, on the margin of said mortgage record, "to plaintiff, his heirs and assigns, seven hundred dollars of the moneys secured by the mortgage, with interest from January 26, 1888." Same day this assignment was noted by the recorder on the back of the mortgage. The mortgagor had no actual notice of the assignment to plaintiff until after she had paid said Jarrett the entire mortgage debt, except the sum of two hundred dollars, etc.

A verdict was taken in favor of the plaintiff, subject to the opinion of the court on the question of law reserved. The facts above stated are, in substance, those upon which the question was reserved. Judgment was afterwards entered for defendants *non obstante veredicto,* and this appeal was taken.

Briefly stated, the question presented is whether the assignment of May 22, 1888, on the margin of the mortgage record, by Jarrett to plaintiff, was such legal notice to the mortgagor as precluded her from setting up payments made by her to Jarrett before she had any actual notice of said assignment.

The key to the solution of this question is in the principle that the recording act was intended not for the benefit of the mortgagor, but to provide a real security for his debt. Not being for the mortgagor's benefit, it is obviously immaterial to him whether or not the mortgage has been recorded. His creditor may or may not avail himself of his security; but the fact of record does not alter the contract relations of the parties. The undertaking of the mortgagor is to pay, and payment wherever or however made will satisfy the debt. He is under no obligation to make inquiry as to the record; and the mortgagee cannot allege an unsatisfied record in answer to a plea of actual payment.

If the debtor is under no obligation to take notice of the record of his mortgage, much less must he take notice of the assignment of it. The assignee has but an equity, and as he is bound to inquire for all the defenses which the debtor may have, whether they appear of record or not, so he must give notice of the assignment if he would protect himself against subsequent payments made to his assignor; Bury v. Hartman, 4 S. & R. 175; Henry v. Brothers, 48 Pa. 70; Horstman v. Gerker, 49 Pa. 282. "Legal or constructive notice as distinguished from actual," said Mr. Justice Strong, in Henry v. Brothers, supra, "is that which the law regards as sufficient to give knowledge. If the existence of knowledge is presumed from any other fact, if the presumption be

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juris et de jure, the other fact must be certain. But there is no certainty that a debtor has knowledge of the entry of a judgment against him by virtue of a warrant of attorney which he may have signed, much less that he has knowledge of the assignment of a judgment. * * * A subsequent incumbrancer or purchaser must know, for it is his duty to examine the record." The recording act imposes no such duty on a mortgagor; it is to the interest of the assignee, not his, that the assignment should be made effectual; and it would be an intolerable hardship if every time he may wish to make a payment and obtain a credit on his debt, he should be compelled to visit the recorder's office to ascertain whether or not his mortgage has been assigned. It is therefore apparent that actual notice of the assignment is essential to the completion of the contract relations between the assignee and the mortgagor; and, consequently, until that has been given, the mortgagor does no wrong in making payments to the mortgagee.

The court below was therefore right in entering judgment for defendants *non obstante veredicto;* and its judgment must be affirmed.[6]

MORSE, C. J., in WILLIAMS v. KEYES, 90 Mich. 290 (1892). The note made by Keyes to C. L. Luce was a negotiable one, and was transferred to complainant before due, and for a valuable consideration. Under the previous rulings of this court he took his mortgage free from all equities of which he had no notice between Luce or his administrators and Keyes; and any payment made to Arthur B. Luce, or arrangement between him and Keyes, after the note and mortgage were transferred to complainant, could not affect the latter's rights in the premises. See Reeves v. Scully, Walk. Ch. 248; Dutton v. Ives, 5 Mich. 515; Helmer v. Krolick, 36 Id. 371; Judge v. Vogel, 38 Id. 568. After the assignment of the mortgage, and indorsement and delivery of the note, to complainant, and before maturity, the defendants assumed to pay the note and mortgage to the administrators of the original mortgagee, without requiring the production of the note; and the only question here is, could they thus discharge the note and mortgage, so as to defeat the right of a good-faith purchaser? The statute (How. Stat., § 5687) provides that—

[6]Compare, Vann v. Marbury, 100 Ala. 438; Brown v. Blydenburgh, 7 N. Y. 141; Foster v. Beals, 21 N. Y. 247; Robbins v. Larson, 69 Minn. 436; Brewster v. Carnes, 103 N. Y. 556.

See also, Rodgers v. Peckham, 120 Cal. 238, construing C. C. § 2935—"When the mortgage is executed as security for money due, or to become due, on a promissory note, bond or other instrument designated in the mortgage, the record of the assignment of the mortgage is not, of itself, notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the person holding such note, bond or other instrument."

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"The recording of an assignment of a mortgage shall not, in itself, be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee."

This statute has no application whatever to the present case. It was not intended to authorize the mortgagor to pay the mortgage to one not the holder of the note; but if a payment be made to one who, by the possession of the evidence of debt, shows himself *prima facie* entitled to receive payment, or, in case of non-negotiable security, if the payment be made to the original holder, the fact that an assignment has been placed of record will not, of itself, invalidate a payment made in good faith to such apparent owner. The statute means no more than that the mortgagor shall not be required to search the record before making payment to the one *prima facie* entitled to receive it. In case of negotiable securities, the holder alone is the one *prima facie* entitled to receive payment. Neither under the statute nor under the law-merchant can the maker of a negotiable note assume that it has not been transferred, and make payment thereof before maturity to the original holder, and thus defeat the right of a purchaser for value before maturity. The case of Dutton v. Ives is directly in point. See, also, 2 Daniel, Neg. Inst., § 1233, and cases cited.

JONES, MORTGAGES, § 843. Whether the rule [that the assignee of a non-negotiable chose in action takes subject to the equities against his assignor] is limited to equities between the original parties is a question upon which different courts are not in accord. On the one hand, the rule that the assignee of a bond and mortgage, which are merely choses in action, takes them subject to existing equities, is limited in its application to such equities only as existed between the mortgagor and mortgagee, and is not extended to those existing between the mortgagee and third persons. The reason for this limitation seems a strong one. "The assignee," says Chancellor Kent, (2 Johns. Ch. 441), "can always go to the debtor, and ascertain what claims he may have against the bond, or other choses in action, which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and for this reason the claim of the assignee, without notice, of a chose in action, was preferred, in the late case of Redfearn v. Ferrier, (3 Dow. 50), to that of a third party setting up a secret equity against the assignor. Lord Eldon observed in that case that, if it were not to be so, no assignments could ever be taken with safety."

§ 844. But the settled rule in New York is that the assignee is

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affected by equities in favor of third persons in the same manner that he is affected by equities existing against him in favor of the mortgagor. This question has been frequently discussed in recent cases in that State. In the case of Bush v. Lathrop, (22 N. Y. 535), Mr. Justice Denio, after examining numerous authorities, came to the conclusion that the supposed distinction between these equities is without foundation, and that the assignee takes the security subject to all equities that third persons could enforce against the assignor, as well as subject to those existing between the parties to the instrument. In that case the holder of the mortgage and bond assigned them by an absolute and unconditional bond, as security for a debt for a much smaller sum than that due upon the mortgage, and his assignee transferred the mortgage for full value to a third person without notice of this fact. The rule above stated as to the equities of third persons was applied to the case, and it was held that the subsequent assignee took the security subject to the equity of the former holder of the mortgage, to redeem it upon payment of the amount of the debt for which he had pledged it.

§ 844a. The doctrine of estoppel may come in to qualify the application of this rule. Thus in the case last named the application of this rule to the facts presented was overruled by the case of Moore v. Metropolitan National Bank, 55 N. Y. 41, although the rule there stated as to the equities of third persons was not questioned. The latter case held that, where the holder of a non-negotiable chose in action has conferred the apparent absolute ownership of it upon another by assignment, one who purchases from such assignee in good faith for value, relying upon the faith of such apparent ownership, obtains a valid title as against the first assignor, who is estopped from asserting a title in hostility to such apparent ownership. The decision is based altogether upon the doctrine of estoppel. The owner of the security, having conferred apparent ownership upon his assignee and apparent authority to convey, is estopped as against a bona fide purchaser to deny that ownership or that authority. Applying this rule of estoppel to the facts of the case presented in Bush v. Lathrop, the owner of the mortgage and bond having assigned them absolutely and conferred upon his assignee apparent absolute authority over the securities, would be estopped from asserting his title to them against one who had purchased upon the faith of the assignee's apparent authority to sell.

* * * * * * *

But aside from the doctrine of estoppel, the rule above stated as to the equities of third persons has been several times approved in recent cases before the Court of Appeals of New York; and the general doctrine is there well established, that one who takes an assignment of a bond and mortgage takes them subject not only

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to any latent equities that exist in favor of the mortgagor, but also subject to the latent equities in favor of third persons.[7]

5 ENCYCLOPEDIA OF LAW AND PRACTICE, 937. (Title, Assignments). The authorities are in direct conflict on the question whether, as between successive assignees, assignments of choses in action take precedence according to their date or only from the time of notice to the debtor.

According to the English rule, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided that at the time of taking it he had no notice of the prior assignment.

In the United States, the English rule has been adopted in the federal courts and in many of the state courts.

It is further held, however, even if a subsequent assignee can acquire priority by notice, that such assignee must be a bona fide purchaser for value, and if he have notice of a prior assignment, that will have priority, and so also if he be put on inquiry. In other states the doctrine requiring notice is denied, and it is held that the assignment is complete on the mutual assent of the assignor and assignee, and does not gain additional validity as against subsequent assignees by notice to the debtor.

If none of the assignees gives notice or the notices are simultaneously given, then the rule prevails that he whose assignment is prior in time is prior in right.[8]

CONSOLIDATED LAWS OF NEW YORK (1909), Chap. 52, Art. 9, § 290. 1. The term "real property," as used in this article, includes lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years.

2. The term "purchaser" includes every person to whom any

[7]See Williston's Wald's Pollock on Contracts, 284, note 78.

[8]See Ames Cases on Trusts, 326-328, note. The learned editor says, inter alia, "Whatever view may be entertained as to the English doctrine which prefers the assignee who first gives notice, the second assignee is in several contingencies clearly entitled to supplant the first assignee. E. g. (1) if, acting in good faith, he obtains payment of the claim assigned; Judson v. Corcoran, 17 How. (U. S.) 612; Bridge v. Conn. Co., 152 Mass. 343; Bradley v. Root, 5 Paige (N. Y.) 632, 640; or (2) if he reduces his claim to a judgment in his own name; Judson v. Corcoran, 17 How. (U. S.) 612; Mercantile Marine Ins. Co. v. Corcoran, 1 Gray (Mass.) 75; or (3) if he effects a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to himself, N. Y. & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 80; Strange v. Houston Co., 53 Tex. 162; or (4) if he obtains the document containing the obligation when the latter is in the form of a specialty; In re Gillespie, 15 Fed. Rep. 734; Bridge v. Conn. Co., 152 Mass. 343; Fisher v. Knox, 13 Pa. 622. In all these cases, having obtained a legal right in good faith and for value, the prior assignee cannot properly deprive him of this legal right."

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estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate.

3. The term "conveyance" includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property.

§ 291. A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded.

PEPPER'S APPEAL.

SUPREME COURT OF PENNSYLVANIA, 1875.
77 Pa. St. 373.

This case arose under the following facts:

On the 16th of February, 1869, Mary J. Pennypacker executed a bond and mortgage to David F. Schuler for $2,000.

On the 27th of the same month, Schuler executed a power of attorney to Raimond D. Fox, to sell, assign, etc., all his real and personal property, etc.; by virtue of this power of attorney, Fox assigned the mortgage to Carroll Neide, on the 28th of May, 1869. The assignment was recorded the same day. The mortgage and bond, with the assignment, were left in the possession of Fox, who was Neide's conveyancer and agent, had acted for him in the purchase of the mortgage, and had been his intimate friend for a long time. Fox had the reputation also of being a man of integrity, and a responsible conveyancer.

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On the 7th of February, 1870, Fox having the bond and mortgage in his possession, under the same power of attorney, assigned them to David Pepper, and delivered them to him with the assignment. Pepper was a bona fide purchaser, and had no actual notice of the assignment to Neide. Pepper's assignment was recorded February 9th, 1870.

On the 13th day of December, 1871, Neide issued a *scire facias* on the mortgage, and judgment being recovered on it, by agreement of parties the amount, $2,070.25, was paid into court, to be paid to the party whom the court should determine was entitled to it. The matter was referred to W. W. Weighly, Esq., who found the foregoing facts.

He reported also, as his opinion, that the assignment of a mortgage is not within the recording acts, so as to make its record notice to a subsequent assignee. He further reported that Neide was guilty of gross negligence in selecting as his agent, the agent of the mortgagee, and leaving the bond and mortgage in his possession, knowing that he had a power of attorney to assign, etc., from the mortgagee.

He therefore awarded to Pepper the money in court, $1,818.50, after deducting expenses.

Neide filed exceptions to the report of the auditor.

The District Court, Mitchell, J., sustained the exception, and awarded the fund to Neide.

Pepper appealed to the Supreme Court, and assigned the decree of the District Court for error.

Mr. Justice MERCUR delivered the opinion of the court, May 10th, 1875.

The contention in this case is between two claimants for the money collected on a mortgage. Each has an assignment for a valuable consideration duly executed by the attorney of the mortgagee.

The assignment to the appellee was made on the 28th of May, 1869, and duly recorded on the same day. The one to the appellant was executed on the 7th of February, 1870, and recorded two days thereafter. The question raised by the first assignment is whether the recording of the first assignment was notice to the appellant.

The 14th section of the Act of April 9, 1849, Purc. Dig. 471, pl. 66, declares "all assignments of mortgages, and letters of attorney authorizing the satisfaction of mortgages, duly executed and acknowledged in the manner provided by law for the acknowledgment of deeds, may be recorded in the office for the recording of deeds in the county in which the mortgage assigned or authorized to be satisfied may be or shall have been recorded, and the record of such instrument or a duly certified copy thereof shall be

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as good evidence as the original assignment or letter of attorney, when duly proved in any court of justice."

It is contended that although this act permits the assignment of a mortgage to be recorded, yet the authority is so far discretionary, that if recorded, the effect is limited to making the record, or a certified copy, evidence. That inasmuch as the language of the statute declares it "may be recorded," it is insufficient to make the record notice to a subsequent assignee.

To this we answer that "may be recorded" are the identical words used in many of the Acts of Assembly providing for the recording of instruments of writing, and substantially the language used in others.

* * * * * * *

Thus it appears that the language of the Acts of Assembly providing for the recording of written instruments has not generally been mandatory. When recorded, however, we do not understand the effect thereof is in any respect lessened by the absence of an imperative command to record. It is optional whether or not to record. When the election is made and an instrument authorized by law to be recorded, is actually recorded, all the incidents and force of a public record attach to that record. It is an early and well recognized principle that one great object in spreading an instrument of writing on a public record, is to give constructive notice of its contents to all mankind: Levine v. Will, 1 Dall. 430; Evans v. Jones et al., 1 Yeates 173; Brotherton v. Livingston, 3 W. & S. 334. We discover no evidence of legislative attempt to make the record of the assignment of a mortgage less effective than that of the mortgage itself. It was held in Pryor v. Wood et al., 7 Casey 142, the assignment of a mortgage, duly executed and recorded passed the legal title, and no suit could subsequently be maintained thereon in the name of the assignor for the use of the assignee. In Partridge v. Partridge, 2 Wright 78, where the assignment was not under seal nor in the presence of witnesses and not acknowledged and recorded, it was held, the *scire facias* might issue in the name of the holder of the legal title for the use of the assignee. The first section of the Act of April 22, 1863, Purd. Dig. 485, pl. 130, provides, however, that the assignee of a mortgage, although the assignment has been duly recorded, may, at his option, sue and proceed thereon, either in his own name, or in the name of the mortgagee, to his use.

Prior to the enactment of the 14th section of the Act of April 9, 1849, supra, the decisions were conflicting as to whether the assignment of a mortgage was within the recording acts. In Craft v. Webster, 4 Rawle 242, and in Mott v. Clark, 9 Barr. 399, it was held not to be; but in Philips v. Bank of Lewistown, 6 Harris 394, it was held to be within the recording Act of May 28,

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1715.[9] The right to record this assignment was set at rest by the Act of 1849. To adopt the view urged for the appellant would defeat the main object of all the statutes which we have cited. Instead of a system designed to give unity and harmony to the recording acts, it would inaugurate one fraught with mischief and uncertainty.

It was alleged on the argument that it is not customary in Philadelphia to search the records for assignments of mortgages. In other parts of the state we think the practice is generally otherwise. Be that as it may, if any custom exists not in harmony with the Act of 1849, it must give way to the statute. *Malus usus abolendus est.*

As the view we have taken is decisive of the case, it is unnecessary to consider the other assignments.

Decree affirmed, and it is ordered that the appellee pay the costs of this appeal.[10]

Sharswood and Paxson, JJ., dissented.

[9]The act provided that, "all bargains and sales, deeds and conveyances of lands, tenements and hereditaments, may be recorded." The court, in the case last cited, said, "A mortgage is in form a conveyance of the land, and an assignment of it is another formal conveyance of the same land. The assignment of a mortgage is therefore within the language of the recording act of 1715", holding the record of an assignment original evidence. So, in Massachusetts, an assignment of a mortgage seems to have been assumed, without question, to be a "conveyance" within the meaning of the recording act, so that the record is constructive notice. Strong v. Jackson, 123 Mass. 60. See also, Swasey v. Emerson, 168 Mass. 118. In Howard v. Shaw, 10 Wash. 151, an assignment was held not to be within the act requiring record of "deeds and mortgages", the question being between the assignee and a subsequent purchaser of the land. (See post, Chap. X.) So in Williams & Co. v. Paysinger, 15 S. Car. 171, the statute dealing in one section with "conveyances" and in another with "mortgage or other instrument in the nature of a mortgage", the court said, "There is no law requiring the assignment of a mortgage to be recorded, and if it had been put on record it would not have amounted to constructive notice", holding that the maker of a promissory note paying a transferee thereof after the latter had transferred and delivered it to a third person, did not discharge his obligation to the holder, even though there was no record of the last transfer.

The commonest form of statute is that which, like the New York statute supra, uses terms so comprehensive that an assignment of a mortgage can hardly be excluded from the "conveyances" etc. which may be recorded; nor an assignee of a mortgage, from the "purchasers" etc. against whom an unrecorded conveyance is declared invalid. The application of these statutes to assignments, for some purposes at least, has almost universally been conceded. See, however, Hull v. Diehl, 21 Mont. 71, and Reeves v. Hayes, 95 Ind. 521.

It should be observed that in several states the earlier decisions holding assignments not within the recording acts have been followed by amendment of the statutes upon this point.

[10]See also, Strong v. Jackson, 123 Mass. 60; Stein v. Sullivan, 31 N. J. Eq. 409; Mott v. Newark German Hospital, 55 N. J. Eq. 722.

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SYRACUSE SAVINGS BANK v. MERRICK.

COURT OF APPEALS OF NEW YORK, 1905.
182 N. Y. 387.

CULLEN, Ch. J. The action was brought to foreclose a mortgage held by the plaintiff on certain real estate situate in the city of Syracuse. No defense was interposed to the plaintiff's claim, but two of the defendants, each claiming to be the holder of a mortgage on the land subsequent to that of the plaintiff, sought to have their respective titles adjudicated in the action. No question has been made as to their right to inject such an issue into the suit, and we shall raise none, though it may be doubted whether the plaintiff should have been delayed in the enforcement of its claim to await the settlement of a dispute in which it had no interest. The facts out of which the controversy arose are as follows: The owners of the property, subject to the plaintiff's mortgage, executed on August 2, 1895, a bond and mortgage to one Warner to secure the sum of $8,398.92, borrowed from him, which last mortgage covered the premises in suit and others. On the same day Warner, to secure payment of a loan of $3,500, executed and delivered to the appellant's testator, Tolman, an assignment of said bond and mortgage. At the same time Warner delivered the bond to Tolman but retained possession of the mortgage. The assignment to Tolman was not recorded until November 12, 1902. On May 16, 1900, Warner assigned for value said bond and mortgage with others to the respondent, the Salt Springs Bank, which assignment was recorded on May 20, 1901. Warner delivered to the respondent the mortgage but not the bond, which was in the possession of Tolman. The trial court found that the respondent had no actual notice of the assignment to Tolman and took its assignment in good faith and for value; that while the respondent did not receive the bond, it made due and diligent inquiry as to the rights of other persons to the bond and mortgage, and did not discover that the defendant Warner had not full right to assign the same. On these facts the trial court awarded the bond and mortgage to the bank. That judgment has been affirmed by the Appellate Division by a divided court. From that judgment this appeal was taken.

The appellants contend that the Recording Act, on the strength of whose provisions title to the bond and mortgage has been awarded to the respondents, does not apply to the present case or affect the rights of the prior assignee of a bond and mortgage whose assignment is not recorded as against a subsequent assignee who records his assignment. It has been decided that an assign-

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ment of a mortgage is a conveyance of real estate within the meaning of the Recording Act. (Westbrook v. Gleason, 79 N. Y. 23; Decker v. Boice, 83 N. Y. 215; Bacon v. Van Schoonhoven, 87 N. Y. 446; Gibson v. Thomas, 180 N. Y. 483.) But in nearly all the cases the question arose, not with reference to the rights of rival claimants to the security, but in regard to the rights of subsequent purchasers or lienors on the land itself.[11] The only case in which the question now before us was presented to this court is that of Kellogg v. Smith, 26 N. Y. 18, in which the question was not determined, the decision proceeding on another ground. The difficulty in disposing of the question is inherent in the nature of the security. On the one hand, it is contended that as the mortgage is merely collateral or incident to the debt, and as there is no provision for the recording of any assignment of the bond, which is the principal obligation, an assignee's title to the debt or obligation cannot be impaired by the failure to record the assignment, nor can the mortgagor be subjected to a double obligation, to wit, to have his land foreclosed under the mortgage and to be held personally responsible on the bond. This view is strongly presented in the dissenting opinion below.[12] On the other hand, it is contended that by the Recording Act it was intended to confer a quasi or limited negotiability on bonds and

[11]See post, Chap. X.

[12]"The assignment of a mortgage may be in the form of a conveyance, and when thus executed and acknowledged it may be admitted to record. But we all know that the assignment of a mortgage may be effected without any such formal conveyance. It may be assigned by a mere writing of the assignor declaring that he thereby assigns the mortgage to the person named in such writing, or it may be assigned by a simple indorsement or delivery of the note for which the mortgage is a security. It is a familiar principle that in the case of a debt secured by mortgage, the debt is the principal and the mortgage an incident, and that an assignment of the debt is an assignment of the mortgage. This principle is too well understood, and the authorities in support of it are too numerous to require citation.

"And in cases of this character which are not in the form of a conveyance, there is no assignment to record or which would be entitled to record. Nor do we understand, when the assignment of the mortgage is made in the form of a conveyance, there is any obligation imposed by the statute which requires the assignee to have it recorded to protect himself against subsequent encumbrancers and purchasers; only, when executed in such form, it may be admitted to record, and when recorded a certified copy of it may, perhaps be used as evidence." Lord, J., in Watson v. Dundee M. & T. I. Co., 12 Ore. 474.

The recording act of Oregon was substantially like section 291 of the New York statute, supra. Misc. Laws (1872) Chap. VI, § 26.

See also, Burhans v. Hutcheson, 25 Kans. 625; Byles v. Tome, 39 Md. 461; Hull v. Diehl, 21 Mont. 71; Holliger v. Bates, 43 Ohio St. 437; Oregon & W. Trust Co. v. Shaw, 5 Sawy. (U. S.) 336.

But see Pickett v. Barron, 29 Barb. (N. Y.) 505.

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mortgages, and that to accomplish this result it must be held that the title to a bond or evidence of debt to secure which a mortgage is given will be defeated by failure to comply with the provisions of the Recording Act as to assignments of mortgages, whatever may be the rule as to the assignment of other obligations. The question is a broad one. In our view, however, its decision is not necessary to a determination of this case, and, therefore, we leave it open.

As already stated, the learned trial court found as a fact that the respondent made due and diligent inquiry; that it had no notice of the rights of Tolman to the bond and mortgage, nor was it able to discover the same. As the decision of the Appellate Division was not unanimous the finding is open to examination by this court and we are of opinion that there is no evidence to sustain it. The failure of Warner to produce the bond at the time of the assignment was sufficient to put the respondent on inquiry and if unexplained to operate as notice of the defect in Warner's title. (Brown v. Blydenburgh, 7 N. Y. 140; Kellogg v. Smith, supra; Merritt v. Bartholick, 36 N. Y. 44; Bergen v. Urbahn, 83 N. Y. 49.) The only evidence of inquiry or diligence on the part of the respondent is that given by the lawyer who acted for it in procuring the assignment. He testified that upon his discovery that several of the bonds were not delivered to him with the mortgages he called the attention of the officers of the bank to that fact and spoke to Warner about it, to which Warner responded: "Well, if any of them are missing they are doubtless in my office and I will have them looked up and furnish them to the bank—hand them in." He also took an affidavit from Warner that he owned the securities. With this the subject was dropped and nothing further was done. Now, so far from this showing due diligence on the part of the assignee, we think it discloses an entire failure to exercise diligence. The learned counsel for the respondent relies on the case of Munoz v. Wilson, (111 N. Y. 295) as an authority for the proposition that where the mortgage itself contains a covenant to pay the debt the production of a bond is not necessary. In that case, however, it was proved that while the mortgage referred to a bond, in fact no bond had ever been given. In the present case, however, the respondent was expressly told that the missing bonds were in the assignor's office. After that statement common prudence would have dictated that the assignor be required to produce and deliver the bonds. If on such demand he failed to deliver them, that failure itself would create suspicion. It is argued that if the demand had been made the assignor would have made some other excuse for his failure to produce the missing security. This does not follow, even if we assume the assignor to have acted dishonestly in the transaction.

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The assignor, however, testified on the stand that at the time of the assignment to the bank, which was one of great excitement on his part, he turned over all his securities to satisfy the bank's claim gainst him as an indorser and that he forgot that he had previously transferred the mortgage to Tolman. If this statement is to be credited it may very well be that Warner, on discovering that the bond was not in his possession, would have recalled the transfer to Tolmán and have refused to assign it to the bank. However this may be, it is no answer to the failure of the bank to make proper inquiry and to obtain the bond to assert that if it had the assignor would have told plausible falsehoods to account for his failure to deliver the bond. This might or might not have proved the case. We cannot speculate on it. The same argument was made before the Supreme Court of Massachusetts in Shaw v. Spencer, 100 Mass. 382, where a security was registered in the name of A, trustee, and transferred to the defendant for the trustee's personal benefit. It was urged that the defendant was relieved from making inquiry of the trustee as to the nature of his interest because the trustee would doubtless have told a falsehood on the subject. It was held that there was no such presumption and that even if such conduct on the part of the trustee was probable it did not relieve the assignee from the duty of making inquiry. The case before us is stronger for the appellant than that of Kellogg v. Smith, supra. In that case the assignor stated to the assignee that the bond and mortgage which he failed to produce were locked up in the safe of his agent who, at the time, was away. It was held that despite this excuse the non-production of the bond and mortgage was sufficient notice to deprive the assignee of the benefit of the Recording Act. In the present case, if the story told by Warner to the bank's lawyer had been true, the bond was immediately accessible.

The judgment of the Appellate Division and that part of the judgment of the Special Term appealed from should be reversed and a new trial granted, costs to abide the event.

Gray, O'Brien, Bartlett, Haight, Vann and Werner, JJ., concur.

Judgment reversed, etc.[18]

LEE v. KELLOGG.

SUPREME COURT OF MICHIGAN, 1896.
108 Mich. 535.

Mary Baker, being the owner of 40 acres of land, on March 30, 1893, executed to one George E. Breck a mortgage thereon

[13]See also, Adler v. Sargent, 109 Cal. 42; Byles v. Tome, 39 Md.

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for $1,000, collateral to six notes—one for the principal amount, and five interest coupon notes. The mortgage was recorded on the day following its execution. June 26, 1893, Breck sold and delivered the notes and mortgage to one Hubbard, accompanying the same with the usual form of assignment. March 17, 1894, Hubbard sold, assigned, and delivered them to defendant Kellogg. These assignments were recorded September 24, 1894. August 17, 1893, Breck forged a mortgage and six notes, for the same amount as the others, upon the same land, with defendant Baker as the maker, and offered to sell and assign them to complainant, Lee. Lee went to an abstract office, and inquired if Breck was the owner, upon the record, of such a mortgage. The abstractor informed him that he was. He then purchased, Breck delivering to him the forged mortgage and notes as and for genuine ones. Subsequently complainant ascertained the true situation, viz., that defendant Kellogg was the bona fide purchaser and owner of the mortgage and notes, and that those held by him were forgeries. He thereupon commenced foreclosure proceedings in chancery by the ordinary suit, making defendant Kellogg a party thereto, "as having, or claiming to have, rights and interests in the premises as subsequent incumbrancer or otherwise." Defendant Kellogg answered, setting up the true state of affairs, and praying affirmative relief by way of cross-bill. Complainant answered the cross-bill, denying that the mortgage and notes held by him were forgeries, and asserting their genuineness. Upon the hearing the bill was dismissed.

GRANT, J. (after stating the facts). The theory of the complainant's bill, and of his answer to the cross-bill, was that he owned and had in his possession the original and genuine mortgage and notes. He did not prove, or attempt to prove, their execution; but, although forgeries, they were admitted in evidence. The complainant made no case entitling him to relief. Under his bill it was incumbent upon him to prove and produce the original mortgage and notes. His bill was not framed upon the theory upon which he now seeks to recover.

Forged papers cannot be made the basis of a recovery, either at law or in equity, against the supposed maker, or those in good faith holding and owning the genuine papers. Austin v. Dean, 40 Mich. 396; Camp v. Carpenter, 52 Mich. 375; Crawford v. Hoeft, 58 Mich. 21; Laprad v. Sherwood, 79 Mich. 520; Williams v. Keyes, 90 Mich. 290. Had the suit been againt Mrs. Baker alone, either at law, upon the notes, or in equity, to foreclose the

461; O'Mulcahy v. Holley, 28 Minn. 31; Brumbach v. McLean, 196 Pa. St. 321; Richards Trust Co. v. Rhomberg, 19 S. Dak. 595; Potter v. Stransky, 48 Wis. 235.

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mortgage, the suit would have failed, upon proof that the papers were forged.

Where an assignor does not have the papers to be assigned, to deliver, this is sufficient to put the purchaser upon his guard, to put his good faith in doubt, and to charge him with any defect in his assignor's title. 1 Jones, Mortg. (5th Ed.) § 483. Forged papers cannot give to an assignee any greater or better right than he would have without any, nor can they be made the basis of a valid assignment, or held to convey to such pretended assignee the original papers, which have been, in good faith, purchased by another. The recording laws do not apply to such a case. Complainant might as well claim that if Mrs. Baker had sold and conveyed the land, by warranty deed, to Kellogg, and, before she had recorded it. Breck had forged a deed from Mrs. Baker to himself, and then conveyed to complainant, he would have been a bona fide purchaser, entitled to the protection of the recording law. Kernohan v. Manss, 53 Ohio St. 118.

The decree is affirmed, with costs.[14]

The other justices concurred.

KERNOHAN v. MANSS.

SUPREME COURT OF OHIO, 1895.
53 Ohio St. 118.

SPEAR, J. The question presented by the record, is whether, both parties, acting in good faith, one who obtains title to a mortgage given to secure several notes to several persons, by assignment for value by one of the mortgagees with delivery of the same and a forged copy of one of several notes secured thereby, indorsed by the payee who was then the owner of the genuine note, obtains a lien for money thus advanced on the faith of the security, in preference to the bona fide indorsee for value of the genuine note obtained afterwards, both transactions occurring before the maturity of the note?[15]

[14]The recording act of Michigan was identical, in all material respects, with that of New York, supra, the difference, if any, being in the direction of a more specific provision for the recording of assignments. See How. Ann. St. §§ 10842, 10843, 10850, 10855, 10856.

Compare Morris v. Bacon, 123 Mass. 58.

[15]The reporter's statement of facts shows that the first assignment was not recorded until after the transfer of the genuine note, and that the transferee of the note examined the records before advancing his money. For the provisions of the Ohio statutes and their construction by the courts, see Swartz v. Hurd, 2 Ohio Dec. 134; Holliger v. Bates,

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It seems to us that the question will be solved by the application of simple and well-established principles. The concession that each party acted in entire good faith removes any necessity for considering equities, and leaves the case to be determined on purely legal grounds.

The following propositions we consider are settled in Ohio:

1. Where a promissory note is secured by mortgage, the note, not the mortgage, represents the debt. The mortgage, is therefore, a mere incident, and an assignment of such incident will not, in law, carry with it a transfer of the debt; on the other hand a transfer of the note by the owner so as to vest legal title in the indorsee will carry with it equitable ownership of the mortgage. And so, if the debt be evidenced by several promissory notes, the legal transfer of a portion of the notes carries with it such proportional interest in the security as the notes transferred bear to the whole. Harkrader v. Leiby, 4 Ohio St., 602; Ex'rs of Swartz v. Leist, 13 Ohio St., 419; Fithian v. Corwin, 17 Ohio St., 118; Allen v. Bank, 23 Ohio St., 97; Holmes v. Gardner, 50 Ohio St., 167.

2. Being but an incident of the debt, the mortgage remains, until foreclosure or possession taken, in the nature of a chose in action. Where given to secure notes it has no determinate value apart from the notes, and, as distinct from them, is not a fit subject of assignment. And where the notes are legally transferred, the mortgagee, and all claiming under him, will hold the mortgaged property in trust for the holder of the notes. Jordon v. Cheney, 74 Maine, 359; Jones on Mortgages, 818; Pomeroy's Eq. Jur., § 1210.

3. All notes payable to any person or order are negotiable by indorsement thereon, so as absolutely to transfer and vest the property thereof in each and every indorsee or holder successively. Such indorsee, or holder, may, in his own name, institute and maintain an action thereon against the maker. Sections 3171 and 3172, Revised Statutes.

4. A holder of negotiable paper who takes it before maturity for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity, holds it by a good title. To defeat a recovery it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part. Nor does the note lose its commercial char-

43 Ohio St. 437. In the latter case, the court said, "Conceding that a written assignment of the mortgage may, under the statute, be recorded and thus be notice to others, yet the statute does not require it, and a failure to have it done cannot divest the assignee of his rights and equities."

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acter when secured by mortgage. Johnson v. Way, 27 Ohio St., 374; Kitchen v. Loudenback, 48 Ohio St., 177.

Applying these rules to the facts, the following conclusions seem to result, viz.:

Kernohan, by the assignment of the mortgage, took the legal title to it so far as the same was owned by McGill, and an equitable right in the $7,602.72 note. He did not take, nor did McGill intend to transfer to him, any legal title to the note, for McGill kept, and intended to keep that in his own possession, unindorsed, and subject to his continued control. Such rights as Kernohan took he might assert as against McGill, but John and Louis Manss alone can recover on the note. They, by their purchase and the indorsement to them by McGill, took a full title to it as against the world, together with the equitable title to the mortgage in whosoever hands it might be. The one has the legal title to the incident, with an equitable right in the debt; the other the legal title to the debt, together with an equitable title to the incident. As both cannot have precedence the weaker must give way to the stronger. The legal title to the incident must be subordinated to that which is superior, viz.: the legal title to the debt, although the holder of the incident acquired his right first. John and Louis Manss were, therefore, entitled to the proceeds of the mortgaged lands.

The case of Kernohan v. Durham, 48 Ohio St., 1, is relied upon by plaintiff in error. In that case Coddington took by indorsement the genuine note after due. Kernohan took an assignment of the mortgage which assignment also purported to transfer the note. This was not only before the transfer of the note to Coddington, but before the note was due. The holding is, that, as between Kernohan and McGill (the payee), the former took an equitable title to the genuine note, and hence, as Coddington's title was acquired after the note had been dishonored, he could take no better right than his indorser had. The note being past due he was put upon inquiry and was chargeable with whatever knowledge due inquiry would have elicited. The vital difference between the position of the holder of the note in that case and in this is, that, while Coddington took his title after due and hence was charged with all infirmities, John and Louis Manss being indorsees and purchasers for value in the ordinary course of trade, before due, took good title as against the world.

Judgments affirmed.[16]

[16]Compare, Himrod v. Gilman, 147 Ill. 293; Boyle v. Lybrand, 113 Wis. 79.

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CHAPTER VI.

REDEMPTION.

PEUGH v. DAVIS.

SUPREME COURT OF THE UNITED STATES. 1877.
96 U. S. 332.

Mr. Justice FIELD delivered the opinion of the court.

This is a suit in equity to redeem certain property, consisting of two squares of land in the city of Washington, from an alleged mortgage of the complainant. The facts, out of which it arises, are briefly these: In March, 1857, the complainant, Samuel A. Peugh, borrowed from the defendant, Henry S. Davis, the sum of $2,000, payable in sixty days, with interest at the rate of three and three-fourths per cent. a month, and executed as security for its payment a deed of the two squares. This deed was absolute in form, purporting to be made upon a sale of the property for the consideration of the $2,000, and contained a special covenant against the acts of the grantor and parties claiming under him. This loan was paid at its maturity, and the deed returned to the grantor.

In May following the complainant borrowed another sum from the defendant, amounting to $1,500, payable in sixty days, with the same rate of interest, and as security for its payment redelivered to him the same deed. Upon this sum the interest was paid up to the 6th of September following. The principal not being paid, the defendant placed the deed on record on the 7th of that month. In January, 1858, a party claiming the squares under a tax title brought two suits in ejectment for their recovery. The defendant thereupon demanded payment of his loan, as he had previously done, but without success.

On the 9th of February following, the complainant obtained from the defendant the further sum of $500, and thereupon executed to him an instrument under seal, which recited that he had previously sold and conveyed to the defendant the squares in question; that the sale and conveyance were made with the assurance and promise of a good and indefeasible title in fee-simple; and that the title was now disputed. It contained a general covenant warranting the title against all parties, and a special covenant to pay and refund to the defendant the costs and expenses, including the consideration of the

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deed, to which he might be subjected by reason of any claim or litigation on account of the premises. Accompanying this instrument, and bearing the same date, the complainant gave the defendant a receipt for $2,000, purporting to be in full for the purchase of the land.

The question presented for determination is whether these instruments, taken in connection with the testimony of the parties, had the effect of releasing the complainant's equity of redemption. It is insisted by him that the $500 advanced at the time was an additional loan, and that the redelivered deed was security for the $2,000, as it had previously been for the $1,500. It is claimed by the defendant that this money was paid for a release of the equity of redemption which the complainant offered to sell for that sum, and at the same time to warrant the title of the property and indemnify the defendant against loss from the then pending litigation.

It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That can not be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity: it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice. Hughes v. Edwards, 9 Wheat. 489; Russell v. Southard, 12 How. 139; Taylor v. Luther, 2 Sumn. 228; Pierce v. Robinson, 13 Cal. 116.

It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right can not be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or

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hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed.

A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor. Especially is this necessary, as was said on one occasion by this court, when the creditor has shown himself ready and skilful to take advantage of the necessities of the borrower. Russell v. Southard, supra. Without citing the authorities, it may be stated as conclusions from them, that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding.

If, now, we apply these views to the question before us, it will not be difficult of solution. It is admitted that the deed of the complainant was executed as security for the loan obtained by him from the defendant. It is, therefore, to be treated as a mortgage, as much so as if it contained a condition that the estate should revert to the grantor upon payment of the loan. There is no satisfactory evidence that the equity of redemption was ever released. The testimony of the parties is directly in conflict, both being equally positive, the one, that the advance of $500 in February, 1858, was an additional loan; and the other, that it was made in purchase of the mortgagor's interest in the property. The testimony of the defendant with reference to other matters connected with the loan is, in several essential particulars, successfully contradicted. His denial of having received the instalments of interest prior to September, 1857, and his hesitation when paid checks for the amounts with his indorsement were produced, show that his recollection can not always be trusted.

Aside from the defective recollection of the creditor, there are several circumstances tending to support the statement of the mortgagor. One of them is that the value of the property at the time of the alleged release was greatly in excess of the amount previously secured with the additional $500. Several witnesses resident at the time in Washington, dealers in real property, and familiar with that in controversy and similar property in its vicinity place its value at treble that amount. Some of them place a still higher estimate upon it. It is not in accordance with the usual course of parties, when no fraud is practised upon them, and they are free in their action, to

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surrender their interest in property at a price so manifestly inadequate. The tax title existed when the deed was executed, and it was not then considered of any validity. The experienced searcher who examined the records pronounced it worthless, and so it subsequently proved.

Another circumstance corroborative of the statement of the mortgagor is, that he retained possession of the property after the time of the alleged release, enclosed it, and either cultivated it or let it for cultivation, until the enclosure was destroyed by soldiers at the commencement of the war in 1861. Subsequently he leased one of the squares, and the tenant erected a building upon it. The defendant did not enter into possession until 1865. These acts of the mortgagor justify the conclusion that he never supposed that his interest in the property was gone, whatever the mortgagee may have thought. Parties do not usually enclose and cultivate property in which they have no interest.

The instrument executed on the 9th of February, 1858, and the accompanying receipt, upon which the defendant chiefly relies, do not change the original character of the transaction. That instrument contains only a general warranty of the title conveyed by the original deed, with a special covenant to indemnify the grantee against loss from the then pending litigation. It recites that the deed was executed upon a contract of sale contrary to the admitted fact that it was given as security for a loan. The receipt of the $2,000, purporting to be the purchase-money for the premises, is to be construed with the instrument, and taken as having reference to the consideration upon which the deed had been executed. That being absolute in terms, purporting on its face to be made upon a sale of the property, the other papers referring to it were drawn so as to conform with those terms. They are no more conclusive of any actual sale of the mortgagor's interest than the original deed. The absence in the instrument of a formal transfer of that interest leads to the conclusion that no such transfer was intended.

We are of opinion that the complainant never conveyed his interest in the property in controversy except as security for the loan, and that his deed is a subsisting security. He has, therefore, a right to redeem the property from the mortgage. In estimating the amount due upon the loan, interest only at the rate of six per cent. per annum will be allowed. The extortionate interest stipulated was forbidden by statute, and would, in a short period, have devoured the whole estate. The defendant should be charged with a reasonable sum for the use and occupation of the premises from the time he took possession in 1865, and allowed for the taxes paid and other necessary expenses incurred by him.

The decree of the Supreme Court of the District must be re-

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versed, and the cause remanded for further proceedings, in accordance with this opinion; and it is

So ordered.

MANNING, J., in BATTY v. SNOOK, 5 Mich. 231 (1858):

Once a mortgage always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee, by which the equity of redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud, and no undue influence brought to bear upon him for that purpose by the creditor. But it can not be done by a contemporaneous or subsequent executory contract, by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures. What we now call a mortgage was at common law a conditional conveyance of the land, by which the title of the vendee was to terminate or become absolute on the performance or non-performance of the condition of the grant by the vendor at the day. When such conveyance was made to secure a debt, or for the performance of some other act by the vendor, equity took cognizance of the transaction, and declared the conveyance a security merely for the payment of the debt, or doing of the act, and on the performance thereof by the vendor, after the day had elapsed, and the estate had become absolute, would decree a reconveyance of the premises. To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract, would be a revival of the common law doctrine, using for that purpose two instruments, instead of one, to effect the object.[1]

[1] "This court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance [become] absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." Lord Chancellor Northington, in Vernon v. Bethell, 2 Eden 110.

"There are, in decisions rendered in England and Ireland, dicta to the effect that, if the making of a mortgage is accompanied by an agreement in reference either to the mortgaged premises or to another subject, by which the mortgagor obtains some 'collateral advantage,' such agreement is void. (See Coote, Mortgages, 19, 20; Jennings v. Ward, 2 Vern. 520; In re Edwards' Estate, 11 Ir. Ch. 367; Broad v. Selfe, 11 Wkly. Rep. 1036.) This theory has, however, been exploded by recent decisions, and the rule established that any agreement between the mortgagor and mortgagee, however advantageous to the latter, if not

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ODELL v. MONTROSS.

COURT OF APPEALS OF NEW YORK. 1877.
68 N. Y. 499.

This action was brought to have a deed, absolute on its face, declared a mortgage, and for an accounting and reconveyance on payment of amount due.

The court found, in substance, that in July, 1865, plaintiff being indebted to defendant for moneys loaned and advanced, executed to said defendant a deed of premises described in the complaint, which deed was absolute on its face, and purported to convey the fee, but that it was executed as and intended as a security for the said indebtedness then existing and what might thereafter accrue, and it was agreed and intended by the parties that plaintiff, upon payment, should have the right to redeem and should be entitled to a reconveyance. That in September, 1866, defendant paid to the plaintiff, at his request, the sum of fifty dollars, and plaintiff then and there signed and delivered to the defendant a paper, of which the following is a copy, viz.:

"New York, Sept. 17, 1866.

"Received from William Montross fifty dollars, in full satisfaction

attended with fraud or oppression, is valid, provided it does not interfere with the right of redeeming from the mortgage. (Biggs v. Hoddinott (1898), 2 Ch. 307; Santley v. Wilde, (1899) 2 Ch. 474. See Noakes v. Rice, (1902) App. Cas. 24, and 13 Harv. Law Rev. 595, 15 Harv. Law Rev. 661). So, in this country it has been decided, in at least one case, that any agreement made at the time of executing the mortgage, if not affecting the right of redemption, and not intended for the purpose of evading the usury laws, is valid. (Gleason's Adm'x v. Burke, 20 N. J. Eq. 300. See, also, Uhlfelder v. Carter, 64 Ala. 527.)" Tiffany, Real Property, §515.

In some of the early cases both in England and America, the validity of powers of sale in mortgages was much questioned. Croft v. Powel, 2 Comyns 603 (1738); King v. Edington, 1 East. 288 (1801); Bergen v. Bennett, 1 Caine's Cas. (N. Y.) 1; Eaton v. Whiting, 3 Pick. (Mass.) 484. And see Colonial Laws of New York, Vol. V, p. 687 (Act of March 19, 1774).

When Powell wrote his treatise on Mortgages (1785) he considered powers of sale "of too doubtful a complexion to be relied on as the source of an irredeemable title" (Vol. I, p. 12). Today, however, the validity of powers of sale is recognized in England and almost all our states and the exercise of the power, like an equitable foreclosure, cuts off the equity of redemption. Jones, Mortgages, §§ 1765-1767. And see post, Chap. VII. In at least one state, however, the view has been taken that a power of sale is validated only by statute and that, therefore, the conditions imposed by the statute upon the exercise of such powers can not be waived by the mortgagor. "Parties may add to these conditions, but can not dispense with them." Pierce v. Grimley, 77 Mich. 273, 280.

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for all claims and demands whatsoever as to the conveyance of property, or otherwise, up to this date.

"THOMAS B. ODELL."

That such payment was made and received, and such receipt signed and delivered with the intention of the parties that the same should be a full settlement of all claims of plaintiff to said lands and premises, and of all claims to any reconveyance thereof. As conclusions of law the court found, that the deed was to be considered as a mortgage; that the payment of the fifty dollars and the receipt given therefor did not operate to change the nature of the deed from a security to an absolute conveyance, nor to release plaintiff's right to rdeem, and that upon payment of the sums due from plaintiff to defendant and the sums paid out by the latter, plaintiff was entitled to redeem; and judgment was directed adjudging that upon payment of such sums within thirty days defendant should reconvey, and in default of such payment that the premises be sold, as in foreclosure sales.

Judgment was entered accordingly.

ALLEN, J. Prior to the transaction of the seventeenth of September, 1866, when the defendant upon the payment of fifty dollars to the plaintiff took an unsealed paper signed by him acknowledging the receipt of the fifty dollars "in full satisfaction for all claims and demands whatsoever as to conveyance of property or otherwise, up to this date," the relation of the parties in respect to the lands now sought to be redeemed was that of mortgagor and mortgagee with all the incidents of that relation. (4 Kent's Com., 143.) The plaintiff had conveyed the premises to the defendant by deed absolute in terms, but the conveyance was not intended as a sale, but as a security for the payment of money, and although there was no defeasance in writing, the intent could be and was shown by parol evidence, and the deed was but a mortgage. Parol evidence is admissible to show that an absolute deed was intended as a mortgage, or that a defeasance has been destroyed by fraud or mistake. (Dey v. Dunham, 2 J. Ch. R., 182; Clark v. Henry, 2 Cow. 324; Marks v. Pell, 1 J. Ch. R., 594; Horne v. Kettletas, 46 N. Y., 605.) A conveyance absolute in terms given as a security, is a mortgage with all the incidents of a mortgage, and the rights and obligations of the parties to the instrument are the same as if the deed had been subject to a defeasance expressed in the body of the instrument, or executed simultaneously with it. (4 Kent's Com., supra.) It must be recorded as a mortgage and not as a deed. (Dey v. Dunham, supra.) This case was reversed in 15 Johnson's Reports, 555, but this principle was recognized by the appellate court that reversed the decree of the chancellor. The reversal was on the ground that the subsequent purchaser claiming adversely to the deed was not a pur-

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chaser in good faith, and so not within the protection of the recording acts. (James v. Johnson, 6 J. Ch. R., 417; 2 Cow., 249.) In White v. Moore (1 Paige, 551), the chancellor held that the fact that there was no defeasance in writing, did not take the instrument out of the effect of the statute, requiring all mortgages to be recorded as mortgages.

The estate remaining in the mortgagor after the law day has passed, before foreclosure, is popularly but erroneously called an equity of redemption, retaining the name it had when the legal estate was in the mortgagee, and the right to redeem existed only in equity. Although a misnomer it does not mislead. The legal estate remains in the mortgagor and is subject to dower and curtesy, to the lien of judgments, may be sold on execution and may be mortgaged or sold as any other estate in lands, while the mortgagee has but a lien upon the lands as a security for his debt, and the land is not liable to his debts, or subject to dower or curtesy, or any of the incidents of an estate in lands. (2 Wash. R. P., 152 and seq.; Jackson v. Willard, 4 J. R., 41; Powell on Mortgages, 258, N. L.) The mortgagor is possessed of an estate in the land in virtue of his former and original right, and there is no change of ownership. So far as the entire estate is concerned, there is but one title and this is shared between the mortgagor and mortgagee, the one being the general owner and the other having a lien which, upon a foreclosure of the right to redeem, may ripen into an absolute title, their respective parts, when united, constituting one title. A mortgagor and mortgagee may, at any time after the creation of the mortgage and before foreclosure, make any agreement concerning the estate they please, and the mortgagee may become the purchaser of the right of redemption. A transaction of that kind is, however, regarded with jealousy by courts of equity, and will be avoided for fraud, actual or constructive, or for any unconscionable advantage taken by the mortgagee in obtaining it. It will be sustained only when bona fide; that is, when in all respects fair, and for an adequate consideration. (Trull v. Skinner, 17 Pick., 213; Patterson v. Yeaton, 47 Maine, 306; Ford v. Olden, L. R., 3 Eq. Cases, 461; Kaldridge v. Gillespie, 2 J. Ch. R., 30; Wash. on Real Prop., ch. 16, par. 1, pl. 24.)

The defendant claims to have extinguished the right of redemption and acquired the entire estate by the payment of the fifty dollars, and in virtue of the written acknowledgment of its payment for the purposes named in it. The paper is, in its terms, ambiguous. It does not purport to convey or transfer any property or estate in lands, but is declared to be in full of all claims and demands whatsoever as to conveyance of property or otherwise. It is but a parol admission of a satisfaction for the right mentioned. The apparent meaning of the instrument is to admit a satisfaction of all claims against the defend-

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ant, claims and demands that may be enforced whether such claims are of a right to a conveyance of property or any other matter. The plaintiff required no conveyance of the lands from the defendant. Upon the payment of the mortgage debt he would have been reinvested with the unincumbered title without conveyance or release from the defendant. As evidence of his title he might have required a reconveyance or a satisfaction of the mortgage, and that the courts would have compelled. But his right of redemption was not, in any sense, "a claim or demand as to conveyance of property or otherwise." The receipt had upon its face, and without explanation, respect to personal claims and demands against the defendant. But the transaction was explained upon the trial, and shown to have been intended as a full settlement of all claims of the plaintiff to the lands and premises and of all claims to a reconveyance thereof. If this payment and receipt did operate to change the nature of the deed from a mortgage to an absolute conveyance, and is a release of the right to redeem so that the mortgagee became seized in fee simple by a union of the estates of the mortgagor and mortgagee discharged of the mortgage, the defense to the action is perfect. It can not be claimed that the written paper *ex proprio vigore,* could have that effect. It does not profess to release the right of redemption or to convey any lands or interest in lands. No lands in particular are referred to. No agreement can be spelled out of the instrument which could be specifically performed, and it could not be aided and made a perfect contract to release or convey lands by parol proof. The whole force of the transaction, as affecting the rights of the plaintiff, is in the payment and receipt of the fifty dollars with intent to extinguish the title of the plaintiff. This cannot operate as an estoppel or take the case out of the statute of frauds. The mere payment of money will not entitle a purchaser to a specific performance of a parol contract for the purchase of an interest in lands. That can be repaid with interest, and no damage ensues from the non-performance of the contract. The purchaser can be made good for the use of his money, which is all that he has lost. Had the defendant, acting upon the faith of this transaction, entered into possession of the premises and incurred expenses, and substantially changed his situation so that he could not be placed in the same situation in which he was before, it might have estopped the plaintiff from taking shelter under the statute of frauds, or alleging the insufficiency of the written instrument to carry out the agreement and intent of the parties. But there are none of the elements of an equitable estoppel in the case as presented by the record.

The plaintiff having a recognized legal estate in fee, he could only be divested of it (except by way of estoppel which does not exist) by some instrument which would be valid under the statute of frauds, and in compliance with the statute prescribing the mode and manner

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of conveying lands. The statute of frauds (2 R. S., 135; par. 8) is very explicit, and needs no interpretation in its application to this case. It declares that every contract for the sale of any lands, or any interest in lands, shall be void, unless in writing, and subscribed by the party by whom the sale is to be made. The whole contract, that is, the agreement to sell and the description of the lands or the interets in lands agreed to be sold, must be in writing and subscribed by the party. The other statute referred to (1 R. S., 738; par. 137) is equally applicable to this case. To hold that the plaintiff had not a fee, would be to overthrow the well-established relation of mortgagor and mortgagee, and reverse their respective positions in respect of the legal estate in the lands mortgaged. The statute declares that every grant in fee or of a freehold estate, shall be subscribed and sealed by the person making the grant, or his lawful agent. If a seal only was wanting to make the instrument relied upon by the defendant valid for the purposes intended, it is possible the court might compel the sealing, but that would not supply the intrinsic defects of the paper writing itself.

* * * * * * *

The rights of the mortgagor and his estate can only be foreclosed by due process of law, or a release by deed in proper form, or a conveyance sufficient to pass the title to an estate in fee. The defendant has not purchased the equity of redemption or acquired the estate of the plaintiff by any proper release or conveyance. No injustice will be done the defendant by the result to which this conclusion leads. He will receive his money and interest, and will be fully indemnified, and he is not entitled to speculate in his dealings with his mortgage-debtor.

The judgment of the Special Term might have directed a redemption, upon the proper terms, within a specified time, or in default thereof the plaintiff be foreclosed. That, I think, would have been the proper judgment. But as no fault is found with the terms of the judgment at Special Term, the judgment of the General Term should be reversed and that of the Special Term affirmed.

All concur, except Rapallo, J., not voting.

Judgment accordingly.

WEST v. REED.

SUPREME COURT OF ILLINOIS, 1870.
55 Ill. 242.

Mr. Chief Justice LAWRENCE delivered the opinion of the Court.

This litigation arose out of the following state of facts:

In April, 1850, Reed, the appellee, applied to West, a banker, for

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the loan of $500. West declined to lend the money, but referred Reed to one Johnson, who agreed to lend the money if Reed would give security on his farm, and if West would promise to pay the money at maturity, in case of Reed's default. This arrangement was made. Reed received the money, and executed to Johnson an absolute deed of the farm, containing 380 acres, and Johnson gave back a bond, binding himself to re-convey in case Reed should repay the money, in two installments, the first falling due September 15, 1850, and the second January 1, 1851. Reed was unable to meet the first payment, and in pursuance of the agreement, West paid the money, and took a conveyance of the land from Johnson. The bond from Johnson to Reed had not been recorded, and Reed promised to bring it and deliver it to the attorney of West, but neglected to do so, and when the attorney subsequently mentioned it to him, he said he had mislaid it. West continued to furnish Reed with money, from time to time, until May 7, 1859, at which date they had a settlement. Reed was a bachelor, with no family, and it was agreed between him and West that the indebtedness should be canceled, and Reed should abandon his right of redemption, and take from West a lease of the farm for his own life, subject only to a rent little more than nominal. The precise amount of the indebtedness we can not ascertain from the record, but it was probably between $1,800 and $2,000, and undoubtedly much less than the value of the land, even subject to Reed's life estate. The annual rent to be paid, was ten bushels of wheat, ten bushels of corn, one fat hog, twelve chickens, and the taxes. West also surrendered to Reed about five hundred dollars' worth of notes, which were independent of the money paid Johnson, and the bank account. The agreement, as stated by Reed himself in his testimony, was, that all papers should be cancelled and all indebtedness given up, the object being, he says, "to secure me the possession of the land during my life time." At the same time with the execution of the lease, the parties executed the following instrument, written upon Reed's book of accounts, and designed to show the settlement and cancellation of the indebtedness."

"May 7, 1859.

"We hereby certify that all matters herein mentioned and described, and all deals between us, are settled and cancelled; the consideration of which, in part, is a lease, executed this day, of the Reed farm, in section 36, township 40, range 36.

(Signed) "W. B. WEST,
H. S. REED."

From this date until 1865, the relations of the parties continued amicable, Reed expressing to his neighbors his entire satisfaction with the arrangement he had made, saying he would rather West should have the farm, after he was gone, than any one else, and

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that he could get money from West whenever he needed it. In the spring of 1865, Reed demanded a settlement from West, and a reconveyance of the land, and about the same time West brought an action against Reed for rent. This suit was subsequently dismissed, and in 1866 West filed a bill in chancery against Reed and Johnson to procure a correction in the certificates of acknowledgment of the deeds. Reed then filed his cross bill, to redeem the land, and the cause having been heard upon bill, answer, replication and proof the court decreed that Reed should be permitted to redeem upon payment of $1,999.51, the sum found to be due by the master. To reverse this decree, the administrators of West, who has died, have prosecuted an appeal.

We do not dissent from the general principles urged by the counsel for appellee. It is settled beyond controversy, that contract between mortgagor and mortgagee, for the purchase or extinguishment of the equity of redemption, are regarded with jealousy by courts of equity, and will be set aside if the mortgagee has, in any way, availed himself of his position to obtain an advantage over the mortgagor.

We do not, however, assent to the position, which we understand counsel for appellee to assume, that when the original transaction between the parties has not been in form a mortgage, but an absolute deed, with a bond to re-convey on the payment of the money at a specific time, the right of redemption cannot be extinguished, except by an instrument which will operate as a technical conveyance of the mortgagor's estate in the land. He undoubtdely has an estate, which will pass by descent, or devise, or by deed. But it is nevertheless a purely equitable estate, that is to say, an interest in the land based upon equitable grounds, and which a court of chancery will protect and enforce when equitable considerations demand. But he has nothing more. The legal title has gone to his grantee by means of a deed absolute upon its face. If the deed, as in the present case, was made to secure a loan of money, and a bond, or contract to re-convey, is taken, the transaction, in a court of equity, is regarded only as a mortgage. But we repeat, the naked legal title has vested in the grantee, and if such transactions subsequently occur between the parties as would render it inequitable that the grantor should be permitted to redeem, a court of equity will, of course, refuse to aid him, as it will always refuse its aid to perpetuate a wrong. It is wholly immaterial whether he has executed a technical release of his equitable interest to the grantee or not. He might have done that, and still be entitled to the aid of a court of equity, which looks to the substance of a transaction, and not to its form. And without having done that, he may have had such transactions with his grantee as would render it inequitable to compel the grantee to suffer a redemption. In such an event, the equitable estate is practi-

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cally gone or annihilated without a release, because the equitable considerations upon which it rested are destroyed by the acts of the parties, and chancery will leave the legal title where they have placed it. The rule is laid down in Washburne on Real Property, that, although equity will not permit a mortgagee to embarrass or defeat the right of redemption by an agreement into which the mortgagor may be induced to enter in order to effect the loan, yet this principle does not preclude any subsequent bona fide agreement between the parties, and where a mortgagor has, upon such subsequent agreement, voluntarily cancelled the instrument of defeasance held by him, it gives to the deed the effect of an original absolute conveyance as between the parties. 2 Wash. on Real Proper. 67, 3 Ed. The author cites numerous cases in support of this position.

In the case at bar, we are of opinion the complainant in the cross bill has no equities which a court can reasonably enforce. There is not a scintilla of evidence in the record tending to show that West, in any way, availed himself of his position as mortgagee to obtain this arrangement from Reed. Indeed, it does not appear that he sought an arrangement of any sort, or that he was, in any mode, holding out threats or appealing to the fears of Reed. On the contrary, it appears that for years before the execution of the instruments in 1859, the same understanding had verbally been had between them, and for six years subsequent to 1859, the arrangement continued in all respects satisfactory, at least to Reed. By the transaction of 1859, West not only cancelled his claims against Reed, but by the lease which he executed to him, he cut himself off from all claim for more than a nominal rent of the land during Reed's life. The cancellation of his claims, and the execution of the lease, could, of course, only have been consented to and carried out by West in consideration that Reed was to relinquish all right of redemption, and that this was the consideration, is shown by the testimony of both parties. It is objected, however, that the consideration was inadequate. As a matter of theory, and forming an opinion upon annuity tables, it probably was very inadequate, but that is not the only question. The parties themselves probably did not consider it so. By the arrangement, West was to go without either his money or the land, or income from either, during the life of Reed, which was very likely to outlast his own, as this record discloses it has. It is near twelve years since the transaction, and neither West nor his estate has received either interest or rent of any moment, nor will any, except an almost nominal sum, be paid while Reed lives. Although life tables are a sufficiently safe guide in reference to a large number of persons in similar circumstances, and where the doctrine of averages can be applied, they are very unsafe in reference to an individual case. These parties bargained in the dark. Reed had no relatives for whom he cared, and, as he frequently said, West had been his

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friend, and he had rather West should have the farm when he was done with it, than any one else. By the arrangement made, he at once paid his debt and secured for himself a farm for life. Neither could say with certainty that he was gaining an advantage in the bargain, nor can this question be accurately settled by any one until Reed has followed West to the grave.

But as we have already admitted, judging by ordinary rules, the consideration was inadequate. Nevertheless, in his circumstances, it was satisfactory to Reed, and continued so for six years thereafter. The bargain was not pressed upon him. Tried by his own testimony, there was no taint of unfairness about it, and why a court should arbitrarily rescind such a bargain, years after it was made, simply because the parties were mortgagor and mortgagee, we are wholly at a loss to discover. As we have already said, it is true courts watch transactions between such parties very closely in order to prevent oppression, but it would be folly to push this jealousy to such an extent as to authorize the mortgagor to repudiate at his discretion every contract he may make with the mortgagee. We are not aware why a privilege should be given to him that is given to no other person, not standing in a fiduciary relation. It is said, indeed, in Coventry's Notes to 1 Powell on Mort. 123, that a sale by a mortgagor to a mortgagee, stands on the same principle as a sale between parties having no connection with each other, and can only be impeached on the ground of fraud. The authorities apply a more rigid rule than this, but we understand the principle to be, that the mortgagee must have availed himself of his position to extort an unreasonable advantage before a court will interfere to set aside the sale. If the parties deal at arms length with each other, without threats, oppression, compulsion or fraud, we do not know why a sale by the mortgagor of his equitable estate to the mortgagee should be rescinded, on the ground of inadequacy of consideration alone, any sooner than it would be if the sale had been to a third person.

In the present case, we see no ground for interference. Reed was as anxious to enter into this agreement as West. There is no pretense of fraud, or compulsion, or oppression. Each party exercised his own judgment in making the bargain, and Reed remained satisfied with it for years. Tried by ordinary tests, the bargain was an unwise one, but it was peculiar, and it is possible the life estate of Reed may be of such long duration, that even the alleged inadequacy of consideration will nearly or quite have vanished. The bargain involved an element of uncertainty as to which each party was willing to take his own risks, and there was no unfairness which a court can make a ground of rescission. To grant the relief sought in this bill would certainly not tend to the preservation of good faith

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in the performance of contracts, and is not demanded by the equities of the case.

The decree must be reversed and the cause remanded.

Decree reversed.[2]

MOONEY v. BYRNE.

COURT OF APPEALS OF NEW YORK, 1900.
163 N. Y. 86.

VANN, J. The case made by the complaint was that of a mortgagor with a right to redeem from a mortgagee or his devisees in possession. The defendants denied that there was any mortgage, alleged an absolute conveyance from the plaintiff to one Owen Byrne, and a subsequent conveyance from the latter to a *bona fide* purchaser. They also pleaded the Statute of Limitations and specified the period of six and ten years as the limit exceeded by the plaintiff in bringing her action.

The facts agreed upon by the parties and admitted by the pleadings are in substance as follows: On the 14th of August, 1878, the

[2] In Villa v. Rodriguez, 12 Wall. (U. S.) 323, the court said, "Principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question." In DeMartin v. Phelan, 115 Cal. 538, the court said, "The relation between the parties was in no sense fiduciary."

The mortgagee may purchase the equity of redemption at a sheriff's sale upon a judgment obtained by a third person, or upon a judgment obtained by himself upon a debt not secured by the mortgage, and there can be no question of fraud or oppression arising out of the mortgage relation, as in private transactions. The only difficulty in this case is as to the effect of such purchase under the doctrine of merger. See Chap. IV, above.

But if the mortgagee recovers judgment on the mortgage debt and then seeks to levy on the mortgaged land, this procedure is generally considered objectionable. In some cases it has been held that the levy is invalid, at least in equity, leaving the mortgagor's right of redemption unimpaired. Powell v. Williams, 14 Ala. 476; Atkins v. Sawyer, 1 Pick. (Mass.) 351; McNair v. O'Fallon, 8 Mo. 188. In other cases the levy has been upheld but has been considered as operating to foreclose the mortgage. Cottingham v. Springer, 88 Ill. 90; Youse v. McCreary, 2 Blackf. (Ind.) 243. And see post, Chap. VII, note on fore closure by scire facias. In other cases it has been held that the mortgagor's only remedy is by injunction. Whitmore v. Tatum, 54 Ark. 457; Lydecker v. Bogart, 38 N. J. Eq. 136. The last view, which validates the levy if it is allowed to proceed, involves difficult questions as to the extent to which the mortgage lien is discharged as against a third person purchasing at the sale, or the debt discharged if the mortgagee himself purchases. See the two cases last cited; also Fosdick v. Risk, 15 Ohio 84. And see Hartshorne v. Hartshorne, supra.

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plaintiff owned and was in possession of a parcel of land in the city of New York worth $10,000 and upwards, and at the same time she was indebted to Owen Byrne in the sum of $3,000, secured by three mortgages on said premises, which were under process of foreclosure. In order to secure the payment of this indebtedness she conveyed the land to said Byrne at his request by a deed dated on the day last named and duly recorded. "The said deed was given as security" and for no other purpose. It contained full covenants, subject to said mortgages, which, as it was declared, "shall not merge in the fee, but shall remain valid and subsisting liens." Said Byrne at the same time gave back a defeasance of even date whereby he agreed to re-convey to the plaintiff upon the payment to him, within one year, of said indebtedness, certain advances which he agreed to make for her benefit and the costs of the foreclosure proceedings. It was stipulated that she should be relieved from personal liability on the bonds, and that no judgment for deficiency should "be claimed or entered against her in any action that may be taken upon said bonds or mortgages, so long as she and all persons claiming under her shall not dispute or contest the title of the" said Byrne "or his assigns to said mortgaged premises or the amounts due him on said mortgages. * * * " Said instrument also provided "that as to the agreement by the" said Byrne "to reconvey said premises, time is of the essence thereof, and, further, that this instrument shall not be recorded by or on behalf of the" plaintiff, "and that for a violation of this provision, this agreement, so far as the same provides for such reconveyance, shall thereupon become utterly null and void." The defeasance was never recorded.

Said Byrne at once took possession of the premises and remained in possession thereof until the 13th of June, 1881, when he conveyed to one Walker by a deed duly recorded, but "said conveyance was made without the consent of the plaintiff, who had no knowledge of it until this action was begun" on the 7th of March, 1895. Said Byrne died on the 11th of January, 1889, leaving a will by which he gave all his property, real and personal, to the defendants. His executor accounted and has been discharged, and the property of the testator has been delivered to the defendants. The plaintiff claimed that the rents and profits of the premises received by Byrne amounted to more than the principal and interest of the debt secured. She alleged in her complaint that if Byrne had conveyed the premises to any one, such conveyance was made without her knowledge or consent. She demanded an accounting as to the amount due from her, and that she might "be at liberty to redeem said mortgaged premises upon payment of whatever may upon such accounting be found due, which this plaintiff hereby offers to pay," and that the defendants be compelled to convey said premises to her. She also demanded alternative and general relief. Said Walker, who still owns the premises,

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was not made a party to the action. The trial judge dismissed the complaint upon the ground that "the statute of limitations is a conclusive defense," and the Appellate Division affirmed, on an opinion rendered in overruling a demurrer to the answer, when the case was in the first department. (15 App. Div. 624; 1 *id.* 316.)

The facts agreed upon show that there was a mortgage; for a deed, although absolute on its face, when given as security only, is a mortgage by operation of law. (Horn v. Keteltas, 46 N. Y. 605; Meehan v. Forrester, 52 N. Y. 277; Odell v. Montross, 68 N. Y. 499; Barry v. Hamburg-Bremen Fire Ins. Co., 110 N. Y. 1, 5; Kraemer v. Adelsberger, 122 N. Y. 467; Macauley v. Smith, 132 N. Y. 524; 15 Am. & Eng. Encyc. 791; 1 R. S. 756, Sec. 3; Laws 1896, ch. 547, Sec. 269.) While there was no covenant to pay the debt, none was needed, for the property was worth much more than the amount of the indebtedness and the mortgagee could safely confine his remedy to the land. (1 R. S. 739.) The absence of such a covenant, the conditional release of any claim for deficiency, and the agreement not to record the defeasance, are of no importance in view of the express admission that the deed was given as security. The deed and defeasance were executed at the same time, and, as the latter in express terms refers to the former, they must be construed the same as if both were embodied in a single instrument. When read together in the light of the admission that the object was to secure a debt, it is clear that the transaction was not a conditional sale and that the covenant making time the essence of the contract to reconvey has no more effect than if it occurred in the defeasance clause of an an ordinary mortgage. An instrument executed simply as security cannot be turned into a conditional sale by the form of a covenant to reconvey, and even if there was a doubt as to the meaning of the contract would be regarded as a mortgage, so as to avoid a forfeiture, which the law abhors. (Matthews v. Sheehan, 69 N. Y. 585.) As was said by the Supreme Court of the United States: "It is an etsablished doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction, and when it is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. * * * It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates." (Peugh v. Davis, 96 U. S. 332, 336.)

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The plaintiff, therefore, is a mortgagor, whose right to redeem from the mortgagee in possession has not been cut off nor cut down by any act or omission on her part. As the defandants stand in the shoes of Owen Byrne, with no rights except by way of gift under his will, the case is the same in principle as if he were living and the sole defendant. After the plaintiff had established her right to redeem, as to him, what answer could he make thereto? Would it be an answer for him to say, "I have conveyed the lands away, and, therefore, you cannot redeem?" While this would be a conclusive answer in behalf of Walker, the present owner of the land, if he had been made a party and the right to redeem had been asserted against him, can Owen Byrne or his devisees say that, by his wrongful act in conveying the land, he deprived the plaintiff of the right to redeem, in any form, and confined her to an action for the moneys received on the sale, to which the Statute of Limitations would be a bar? Can a mortgagee, by his own act, without a judicial sale or the consent of the mortgagor, destroy the right to redeem, which is so carefully guarded by the courts? The mortgagee could not, by selling the mortgaged premises, change the rights of the plaintiff as against himself. As to him, she still has the right to redeem, for by his act, without her knowledge or consent, he could not annul his covenant to reconvey. That covenant is still in force, and the plaintiff may compel its performance, so far as the rights of third parties, acquired under the Recording Act, will permit. As Owen Byrne conveyed to a bona fide purchaser, the plaintiff cannot follow the land, as such, but she is not prevented by that wrongful act from any form of redemption now practicable. No act of his could utterly destroy her cause of action to redeem. He might affect its value, but he could not take its life. As a substitute for a decree requiring him to repurchase the land and convey it to her, which might be impossible and would be apt to involve hardship, she may treat the value of the land, measured in money presumed to be in his hands when her right to redeem was established, as land, and enforce the right of redemption accordingly. Unless we virtually sanction his wrongdoing by permitting him to defeat her right of redemption absolutely by his own act, upon showing a right to redeem, she must be permitted to make the best redemption possible as against him. Because he has put it out of his power to render to her all she is entitled to, he cannot refuse to make the nearest approach to it that is left. A court of equity, in order to bring about an equitable result, disregards forms and treats money as land and land as money, when required to prevent injustice. A mortgagee in possession under a recorded deed, absolute on its face, with an unrecorded defeasance, cannot sell the land and claim that the purchase price is money, as against one who has an equitable right to insist that in legal effect it is land. As the plaintiff established a right to redeem, Owen

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Byrne and his devisees can not complain if, in working out the relief required by the violation of his covenant, the court does the best it can to right the wrong by treating the money as land. In order to prevent him from making a profit out of his wrong, the law raises the presumption that he now has the full value of the land as a separate fund in his hands, and treating it as land allows the plaintiff to redeem, the same as if it were in fact land. As against the wrongdoer and his estate it will exert all its power to make the plaintiff whole, paying due regard to equities arising through improvements upon the land, so as not to give her more than she is equitably entitled to.

Thus, in Meehan v. Forrester (supra) the court, through Rapallo, J., said: "The sale was shown to have been made without the consent of Meehan and in violation of his rights, and it does not appear that the plaintiff ever had notice of it. He was not bound by such a sale. He was entitled to his land, on payment of the amount due to Bertine or his representatives. If Bertine, by reason of his wrongful act, had deprived himself of the ability to restore the land to which the plaintiff is equitably entitled, he or his representatives were bound to account to the plaintiff, at his election, either for the proceeds of sale of the land, or its value at the time when the plaintiff's right to such reparation was etsablished. (Hart v. Ten Eyck, 2 Johns. ch. 117; Peabody v. Tarbell, 2 Cush. 227, 233; May v. LeClaire, 11 Wall. 236, 237.)"

In that case, as in this, the only cause of action alleged or proved was the right to redeem, but as the premises had been wrongfully conveyed, the plaintiff, upon establishing such right, was awarded compensation on the basis of value at the time of the trial. Compensation was allowed as an equitable substitute for actual redemption. In other words, the land which should have been conveyed was appraised by the court, and the defendant compelled to restore the amount of the appraisal, as the only method of redemption possible. The form of relief granted was a money judgment, but that was possible only because a right to redeem had been established, for without that right the relief would be limited to the proceeds of the sale. (Baily v. Hornthal, 154 N. Y. 648, 661.) So in the case at bar, the plaintiff established the same right, but the defendant showed that he had placed it beyond his power to reconvey. Thereupon in rebuttal and not as a part of her cause of action, the plaintiff had the right to prove the present value of the land, so as to follow the money presumed to be in the defendant's hands, and redeem that which he had wrongfully substituted for the land, the same as if it were in fact land. Guided by the cardinal principle that the wrongdoer shall make nothing from his wrong, equity so moulds and applies its plastic remedies as to force from him the most complete restitution which his wrongful act will permit. (May v. LeClaire,

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78 U. S. 217; Van Dusen v. Worrell, 4 Abb. Ct. App. Dec. 473; Miller v. McGuckin, 15 Abb. (N. C.) 204; Hart v. Ten Eyck, 2 Johns. Ch. 62, 108; Enos v. Sutherland, 11 Mich. 538, 542; Budd v. Van Orden, 33 N. J. Eq. 143; S. C., Id. 564.) When he cannot restore the land it will compel him to restore that which stands in his hands for the land, and will not permit him to assert that it is not land when the assertion would be profitable to himself but unjust to the one whom he wronged. He cannot escape by offering to pay what he received on selling the lands, but must pay the value at the time of the trial. He cannot cut off the right of redemption and convert it into a personal liability, for he is still a mortgagee, and subject as such to the mortgagor's rights. The fact that the injured mortgagor need not take the proceeds of the sale, but may insist on the proved value of the land, as well as the pleadings and proofs, show that this is a pure action to redeem, and must be so regarded for all purposes, including the defense of the Statute of Limitations. While the mortgagor is helpless as against his grantee, she is not helpless as against him.

The defendants insist that as the plaintiff can only recover a money judgment, the cause of action is in the nature of an accounting for money had and received, and hence that the six-year, or at the most the ten-year Statute of Limitations is a bar. This is not an action, however, to recover money, but to redeem land from a mortgage, and but for the misconduct of the defendant would have resulted simply in a judgment of redemption, with an accounting for the rents and profits of the land, after payment of the debt by the plaintiff, according to her demand and offer before the commencement of the action. The period of limitation provided by the Code, within which an action to redeem from a mortgage may be maintained, is twenty years after breach of the condition or the nonfulfillment of the covenant therein contained. (Code Civ. Pro., § 379.) So far as the defendants are concerned, the plaintiff had a right to redeem. She brought her action to redeem and established it by evidence, and was entitled to judgment accordingly, but as that judgment would be ineffectual because the mortgagee had sold the land, equity will simply vary its relief from a judgment of redemption in land to a judgment of redemption in money representing the land. If the plaintiff had not elected to redeem, but to sue for money had and received to her use, the case of Mills v. Mills (115 N. Y. 80), relied upon by the defendants, might be an authority. In that case, however, as was stated by this court, "all the relief asked for in the complaint is an accounting and a judgment for a sum of money, and no other relief was needed or possible upon the facts established. This was in no sense an action to redeem, as there was no mortgage and nothing to redeem." The relief demanded, as appears from the appeal book on file in this court, was simply a judg-

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ment "for all moneys received by" the defendant. No claim was made that the two transactions, which were four years apart, constituted a mortgage, or that there was ever a right to redeem. The theory of the action was that the defendant lawfully sold the land and should account for the proceeds, after deducting his own claim. Thus, the court said: "Absolute title to the lands was vested in the defendant, evidently with the intention that he might sell them and reimburse himself, and pay over any surplus to his brother." The fundamental fact that the defendant sold without right was wanting in that case, and hence the principle, which is the basis of our judgment, could not be applied. It is the wrongful conveyance by the mortgagee in possession, under a deed absolute on its face, that enables a court of equity to hold on to the case after ordinary redemption has been shown to be impossible, and to allow such a redemption against the wrongdoer as will prevent him from gaining by his wrong, and will give the plaintiff her due as nearly as may be.

The judgment appealed from should be reversed and a new trial granted, with costs to abide event.

Parker, Ch. J., Bartlett, Martin and Werner, JJ., concur; Gray, J., not voting; Cullen, J., not sitting.

Judgment reversed, etc.[3]

[3] The New York Code of Civ. Proc. (1890), § 379, expressly limited a suit to redeem. In most states, however, there is no statute expressly touching such suit. Under these circumstances, the courts have in most cases, applied, by analogy, that section of the statute which limits actions for the recovery of land. Gunn v. Brantley, 21 Ala. 633; Skinner v. Smith, 1 Day (Conn.) 124; Morgan v. Morgan, 10 Ga. 297; Roberts v. Littlefield, 48 Maine 61; Ayres v. Waite, 10 Cush. (Mass.) 72; Robinson v. Fife, 3 Ohio St. 551. Other courts have applied by analogy the section which limits foreclosure of the mortgage; Bradley v. Norris, 63 Minn. 156; or the omnibus section limiting actions not specifically provided for; Barr v. Vanalstine, 120 Ind. 594; Miner v. Beekman, 50 N. Y. 337 (prior to the statute above cited). Whatever period is to be applied, it is generally agreed that the statute only runs in favor of a mortgagee in possession; Morgan v. Morgan, and Bradley v. Norris, supra; Knowlton v. Walker, 13 Wis. 264; Clark v. Hannafeldt, 79 Neb. 566; and not then, if the possession is held under the mortgage and not adversely. Robinson v. Fife, and Miner v. Beekman, supra; Waldo v. Rice, 14 Wis. 286; Anding v. Davis, 38 Miss. 574; but see McNair v. Lot, 34 Mo. 285; Morgan v. Morgan, supra. There is, however, some authority for the position that, as the remedies of the mortgagor and mortgagee must be mutual, when, upon any mortgage, the suit to foreclose is barred, the suit to redeem is barred ipso jure, whether the mortgagee has had possession or not. Taylor v. McClain, 60 Cal. 651 (now reversed by Code Civ. Proc., § 346); Fitch v. Miller, 200 Ill. 170; Adams v. Holden, 111 Iowa 54; Holton v. Meighen, 15 Minn. 69 (overruled by Bradley v. Norris, supra, which exposes the fallacy in this doctrine). See also Locke v. Caldwell, 91 Ill. 417, involving a curious inversion of the same doctrine.

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GIBSON v. CREHORE.

SUPREME COURT OF MASSACHUSETTS, 1827.
5 Pick. (Mass.) 146.

[Bill to redeem. The complainant is widow of the mortgagor and joined in the mortgage to release her dower. The defendant, after the death of the mortgagor, purchased the premises from his administrator, subject to the mortgage in question, and subsequently procured an assignment of this mortgage from the mortgagee. In a prior suit between the same parties (3 Pick. 475) it was held that the equity of redemption and mortgage had not merged in the defendant, and that he was entitled to claim the rights of the mortgagee as against this complainant. The complainant has not had a legal assignment of dower.]

WILDE, J. That the widow of a mortgagor is entitled to redeem the mortgage, is a necessary inference from the doctrine, repeatedly laid down as the law of Massachusetts, that a widow is dowable of an equity. It is a familiar principle in courts of equity, that every person interested in an estate mortgaged is entitled to redeem; and this principle is confirmed, if it requires confirmation, by St. 1798, c. 77, by which it is enacted, "that the mortgagor or vendor, or other persons lawfully claiming under them, shall have the right to redeem." If, therefore, a widow can lawfully claim under her husband, of which there can be no question, she has a right to redeem, by the express words of the statute.[4]

[4] Compare, Rogers v. Herron, 92 Ill. 583; Loomis v. Knox, 60 Conn. 343; Bacon v. Bowdoin, 22 Pick. (Mass.) 401; Kebabian v. Shinkle, 26 R. I. 505.

"Any person who may have acquired any interest in the premises, legal or equitable, by operation of law or otherwise, in privity of title with the mortgagor, may redeem, and protect such interest in the land. Story, Eq. Jur., § 1023. But it must be an interest in the land, and it must be derived in some way, mediate or immediate, from or through, or in the right of the mortgagor; so as, in effect, to constitute a part of the mortgagor's original equity of redemption. Otherwise it can not be affected by the mortgage, and needs no redemption.

"But whatever may be the title or interest claimed, it must in some way appear on the face of the bill, and the nature and extent of it must be set forth." Christiancy, J., in Smith v. Austin, 9 Mich. 465.

"It is not stated that the sheriff's sale [from which complainant seeks to redeem] was on the decree mentioned. If it was not, it may have been on a junior lien. If that were true no right of redemption existed because the appellee could sell on his foreclosure and the title conveyed would be paramount to the title secured by the appellant by his purchase. A person can only redeem when he has an interest to protect, and where, without such redemption, he would be a loser." McCabe, J., in Dawson v. Overmyer, 141 Ind. 438.

"The tender proposed to be proved appears to have been made by the plaintiff. The objection to it was that plaintiff was not in position

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The objection, therefore, to the plaintiff's right to redeem is clearly unfounded, unless it can be maintained that a legal assignment of dower is an essential requisite to complete her title. It is true that before such assignment she cannot enter on any part of the land, for it cannot be ascertained in what part her dower will be assigned; nor can she maintain a writ of entry, for her legal right is inchoate. But an assignment of dower is not necessary to enable her to maintain a suit in equity for the purpose of redeeming the mortgage, because the assignment of dower does not affect her equitable right of redemption, and because she has no right to demand such assignment as against the mortgagee, before she redeems the mortgage. Nor is an assignment of dower by the heirs necessary; because, as will be shown hereafter, she could not redeem a part or parcel of the mortgaged premises, without redeeming the residue also, if required so to do by the mortgagee. The assignment of dower, therefore, is of no importance, and is not necessary to perfect her title to redeem the mortgage.

* * * * * * *

Proceeding on these principles, and considering the mortgage as a subsisting incumbrance, we come next to the question, whether the entry and possession of the defendant are sufficient in law to foreclose the mortgage.

To render an entry and a subsequent possession of three years effectual for this purpose, there must have been notice, express or implied, to the person who is to be bound by such foreclosure. The case shows that there has been no express notice; and as the defendant first entered as the purchaser of the equity, notice of the subsequent entry cannot be presumed. In the bill the plaintiff denies all knowledge of the entry under the mortgage, and this averment is not denied by the answer; so that it seems to be an admitted fact that the plaintiff had no notice or knowledge of the defendant's entry to foreclose, and if so, then clearly she is not bound.

Considering, then, that the plaintiff's right to redeem is not extinguished by the defendant's entry and possession under the mortgage, we are to decide upon what terms and to what extent she is now entitled to redeem.

As the defendant has purchased the equity, as well as the mortgage, it would seem equitable to allow the plaintiff to redeem a third part of the mortgaged premises, by paying her equitable portion of the mortgage debt, according to the value of her right of dower as compared with the residue of the estate. But this cannot be done

to make it. He was not mortgagor or grantee of the mortgagor, or in any manner at that time interested in the equity of redemption. He had tax titles, it is true, but these were not subject to the mortgage. * * * Nothing is plainer than that such a person has no right of redemption." Cooley, J., in Sinclair v. Learned, 51 Mich. 335.

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without infringing the defendant's rights as assignee of the mortgage. He stands in the place of the mortgagee, and has an undoubted right to insist on his whole debt. Nor can he be compelled to be redeemed by parcel, for by thus dividing the estate, the income or value of the whole may be reduced. The rule therefore is, when several are interested in an equity of redemption, and one only is willing to redeem, he must pay the whole mortgage debt; and the others interested in the equity, who refuse to redeem, are not compellable to contribute; for it would be unreasonable to compel a party to redeem, when perhaps it might be for his benefit to suffer the mortgage to be foreclosed. The mortgagee, however, is not to be entangled with any question which may arise between the owners of the equity, in relation to contribution, but has the right to insist on an entire redemption.[5] If, therefore, several estates are mortgaged to one mortgagee, and the mortgagor afterwards conveys the estates separately to different persons, although each owner of the separate estates may redeem, yet it can only be allowed by payment of the whole mortgage debt. And the party so redeeming will be entitled to hold over the whole estate mortgaged, until he shall be reimbursed what he has been thus compelled to pay beyond his due proportion. He is considered an assignee of the mortgage, and stands, after such redemption, in the place of the mortgagee, in relation to the other owners of the equity. So if there be tenant for life and remainderman of an equity, either may redeem, but not without paying the whole mortgage. In like manner a dowress or jointress of lands mortgaged may redeem, she paying the mortgage debt, and may hold over, if the heir refused to contribute, until she and her executor shall be repaid with interest. Palmer v. Danby, Prec. Ch. 137; Saville v. Saville, 2 Atk. 463; Banks v. Sutton, 2 P. Wms. 716; Elwys v. Thompson, 9 Mod. 396; 15 Viner, 447; Ex parte Carter, Ambl. 733; Powell on Mortg. 392, 708, 309, *in notis*.

If the defendant had redeemed the mortgage, the plaintiff would have been let in by contributing her portion of the mortgage debt, according to the value of her life estate in one-third part of the mortgaged premises, in conformity with the rule adopted in the case of Swaine v. Perine, 5 Johns. Ch. R. 482. But as the defendant, being assignee of the mortgage, insists on the payment of the whole

[5] It has usually been held that one redeeming can not insist upon the holder of the mortgage executing an assignment to him. "He will have done his whole duty by releasing his interest on receiving payment. He is not required to adjust or regard the equitable rights to contribution which may exist between parties having different interests in the equity, or to protect them by transferring his title to any one." Lamb v. Montague, 112 Mass. 352. But in a few cases the contrary has been held, with limitations. See Jones, §§ 1086, 1087. Probably the holder of the mortgage would everywhere be restrained from discharging the mortgage of record, if he threatened so to do, in prejudice of the equitable rights of the party redeeming.

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mortgage debt, the plaintiff cannot redeem on any other terms. After redemption, she will hold as assignee of the mortgage, but will be bound to keep down one-third of the interest during her life, and may hold over for the residue of the mortgage debt. The defendant must be held to account for the rents and profits from the time of his entry under the mortgage; for although this entry cannot operate by way of foreclosure, for want of notice to the plaintiff, yet it is sufficient to charge him with the reception of the rents and profits.

The case must be referred to one of the masters in chancery to take an account accordingly, and redemption will be decreed upon payment of the debt which remains due on the mortgage after deducting the rents and profits.[6]

EARL, J., in CASSERLY v. WITHERBEE, 119 N. Y. 522 (1890):

As a condition to his right to maintain this action it was not necessary for the plaintiff, before the commencement thereof, to tender or offer to pay the balance due upon the mortgages. Nor was it necessary for him to offer in his complaint to pay the amount which should be found due. There are, undoubtedly, authorities laying down the rule in general terms, that before an action to redeem from a mortgage can be maintained, the mortgagor must either tender the amount due upon the mortgage, or offer to pay the amount in his complaint. But it has never been so decided in this court, and we think it is now the settled law in this state, under our present

[6] The defendant afterward consented to a redemption of complainant's interest upon a proportional payment, which, as was said in McCabe v. Bellous, 7 Gray (Mass.) 148, he might well do, "because if she paid the whole mortgage debt, she would hold the mortgage as equitable assignee, beyond her proportion, and the defendant would have again to redeem of her." Compare Hartshorne v. Hartshorne, supra; Eldridge v. Eldridge, 14 N. J. Eq. 195, and Bell v. Mayor of New York, 10 Paige 49, 71. See also Coffin v. Parker, 127 N. Y. 117; North Hudson County R. Co. v. Booraem, 28 N. J. Eq. 450.

A stipulation is frequently introduced into a mortgage that part of the premises may be redeemed upon part payment; as, for example, "that upon any interest day the mortgagor will release any one or more of said lots upon payment to him of all accrued interest and the further sum of $100 for each lot released, which sum so paid shall be credited upon the principal of said notes," etc.

Under the doctrine that he who seeks equity must do equity, it has sometimes been held that one seeking to redeem must pay not only the whole mortgage debt but also any unsecured debt which he may owe to the mortgagee. This doctrine has never been extended to permit the mortgagee to tack unsecured claims to his mortgage upon a proceeding to foreclose, and the doctrine has usually been repudiated in toto. The English doctrine of Consolidation by which one holding several mortgages made by the same mortgagor on different parcels of land could hold each mortgage as a security for all the debts, even against a purchaser of one of such parcels, has never been recognized in this country. See Tiffany, Real Property, § 543.

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system of pleadings, that the allegation of such a tender or offer is unnecessary. It certainly is not necessary to allege that a tender or offer to pay the amount due upon the mortgage was made before the commencement of the action; and an offer in the complaint is at most a technical matter, serving no substantial purpose, because in the judgment given in such an action the court always provides that redemption can be had upon payment of the amount due. The tender and offer are important only, as they have bearing upon the question of costs. The mortgagor's right of redemption is not dependent upon his offer or tender of payment. It exists independently thereof, and antecedently thereto. The tender or offer is not needed to put the mortgagee in default, and if made, no relief can be based thereon as the rights of the parties are not changed thereby, and independently thereof are always taken care of and regulated in the judgment. Payment upon redemption and as a condition of redemption can be enforced in the action, and the dismissal of the complaint in such an action, on default of payment under the judgment, as a condition of redemption, operates as a foreclosure. (Bishop of Winchester v. Paine, 11 Vesey, 194.)

In Quin v. Brittain (Hoff. Ch. 353), it was held that it was not essential in a bill to redeem to offer to pay the amount due upon the mortgage; that in such a suit there is no decree for payment, but the bill is dismissed in default of payment, and then the decree becomes equivalent to a foreclosure. The learned vice-chancellor, in that case, said: "It is objected that there is not in the bill an offer to pay the amount due. I do not find in the precedents that such an offer is distinctly made. The form is that upon the payment of what, if anything, shall be found due in respect to principal and interest, the mortgagee may be decreed to deliver possession. Neither can it be essential, because no decree is ever made upon such a bill for the payment of the amount personally. If the amount found due is not paid, there is a decree of dismission, with costs, which is equivalent to a decree for foreclosure." In Beach v. Cook (28 N. Y. 508), it was held that in an action to redeem from a mortgage it was not necessary that the complaint should contain an express general offer to pay any balance which might be found due. Selden, J., writing the opinion of the court, said: "There is no express general offer to pay any balance which might be found due; but it was held under the former system of pleading that such an offer in a bill to redeem was not necessary, and it is certainly not indispensable now. * * * The case, therefore, was in form, one in which it was proper to allow the plaintiff to redeem, and I can discover nothing in his position to render such redemption unjust or inequitable. * * * If he fails to redeem within the time appointed, the dismissal of his complaint as the consequence

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of such failure, operates as a foreclosure of the mortgage." (See, also, Miner v. Beekman, 11 Abb. (N. S.) 147, 160.)[7]

PECKHAM, J., in BOLLES v. DUFF, 43 N. Y. 469 (1871):

The defense in this case claim that the suit of Roberts v. Whitney & Earle was simply to redeem, and the failure to pay the sum decreed to be due within the time allowed, and the complaint being dismissed, operated as a strict foreclosure, and the estate of the mortgagor was thereby forfeited.

* * * * * * *

But if the defendant Duff insist upon this forfeiture, he must show that the decree clearly gives it to him. It seems that there never was in this case any final order obtained (upon proof of the fact that there had been no payment), that the complaint should stand dismissed. The authorities in England are quite uniform that this final order is necessary in a strict foreclosure, and that until that final order is obtained, the mortgage is not foreclosed, and no title passes to the mortgagee. (2 Danl. Pl. and Pr., 1205; Sheriff v. Sparks, West. Rep., 130; Thompson v. Grant, 4 Mad., 232; Faulkner v. Bolton, 7 Sim., 319; 2 Fisher on Mortg., p. 1037, par. 1881; Smith's Ch. Pr., 725; Hansard v. Hardy, 18 Ves., 460; Wood v. Surr, 19 Beav., 551.) No case is cited in this state to the contrary of this rule, but Chancellor Kent, in Perine v. Dunn, 4 John. Ch., p. 143, seems to give it sanction. (See his Commentary there, as to the case of Jones v. Hendrick.)

Without extending this rule beyond the cases to which it is now applied, I think it sound in its application here, to a strict foreclosure implied from the dismissal of a bill to redeem.

Until that order be obtained, the records of the court do not show which party has finally obtained the judgment or who is the owner of the land. Until that order is obtained, the complainant may apply to have the time to pay the amount decreed to be due extended.[8]

[7] The bill in this case charged that the defendant mortgagee had made a foreclosure sale, had purchased the property at the sale, and had taken possession, but that the sale was void, and prayed an accounting by the defendant for the value of the property. The court held that the sale was void but that the defendant could not be compelled to take the property "at a valuation"; that the sale left the parties where they were before and that the plaintiff's only right was to redeem; and that the bill might stand as a bill to redeem.

In the case of Beach v. Cook, cited by Justice Earl, the bill charged that the mortgage had been fully paid and prayed a discharge; it was found that there was a small sum remaining due; it was held that the bill might stand as a bill to redeem. See Jones, Mortgages, § 1095.

[8] Compare, Flanders v. Hall, 159 Mass. 95.

"A further point is made that the decree is illegal because it amounts to a strict foreclosure. It does not provide for a sale, but

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says if the amount required to be paid by way of redemption is not paid within the time named then the mortgage shall stand foreclosed. Such a decree is in effect the same as one providing that if the money is not paid within the specified time then the bill shall be dismissed at the costs of the plaintiffs; for it seems that a decree in the latter form followed by a dismissal will operate as a foreclosure. 2 Jones on Mortgages (4 Ed.), sec. 1108." Black, J., in Martin v. Ratcliff, 101 Mo. 254. Compare, Odell v. Montross, supra.

"The practice in this state on bills to redeem has long been settled against strict foreclosure in case of default, unless in very peculiar cases. In case the redemption money is not paid as decreed, the remedy will be by sale as on foreclosure. The decree in this case will be so framed." Campbell, J., in Meigs v. McFarlan, 72 Mich. 194.

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CHAPTER VII.

FORECLOSURE.

SECTION 1. EQUITABLE SUIT.

MOULTON v. CORNISH.

COURT OF APPEALS OF NEW YORK, 1893.
138 N. Y. 133.

MAYNARD, J. In 1886 the plaintiff was the owner of a mortgage, given to secure the payment of eighty-six hundred and fifty dollars and interest, upon three several lots of land in the town of Floyd, Oneida county, known as the Klock, Eells and Tavern farms, and the defendant was the owner of a subsequent mortgage upon the same property given to secure the payment of $2,500 and interest, which, with the assignments to him, were recorded in the Oneida county clerk's office.

On May 16th the plaintiff commenced an action in the Supreme Court for the foreclosure of her mortgage, but omitted to make the defendant a party thereto. This omission was not intentional, but the plaintiff was misled by an abstract of a search obtained from the clerk's office, from which it might have been fairly inferred that the defendant's assignment was one in a series of transfers, and that the title to his mortgage was in another, who was made a defendant, and who appeared from the abstract to be a subsequent assignee. If a full statement of the search in the usual form had been obtained by the plaintiff, the interest of the defendant in the mortgaged property would have correctly appeared. The action resulted in a judgment entered December 27, 1888, decreeing a foreclosure of the plaintiff's mortgage, and a sale of the mortgaged premises by a referee pursuant to the provisions of the Code, and the practice of the court in such cases. The premises were first advertised by the referee to be sold on March 2, 1889. Before that time the plaintiff discovered that the defendant was a necessary party to the complete foreclosure of her mortgage, and she procured the sale to be postponed until March 16th; and made a motion, at a Special Term held at Syracuse on that day, for an order granting her leave to amend the summons, complaint, *lis pendens* and judgment in the action by inserting therein the name of this defendant, and adjudging and

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decreeing that he be forever barred and foreclosed of all right, title, interest and equity of redemption in the mortgaged premises, or for such further order or relief as the court might deem proper to grant. Upon the hearing of that motion, the court made an order, which was entered, and which has not been reversed or vacated, directing that upon payment of $10 costs, the plaintiff might, if she so elected, open the judgment in the foreclosure suit, and amend the summons, complaint, *lis pendens* and all subsequent proceedings, by making this defendant a defendant in that action, and inserting the necessary allegations for that purpose, and that the amended summons and complaint be served on him, and that he have the usual time to answer. The plaintiff did not avail herself of the privilege afforded by this order, and on March 16, 1889, the referee proceeded to sell the mortgaged premises. At the opening of the sale, and before selling, the referee announced and read the conditions of sale, which were in the usual form, except the last paragraph, which was in these words: "7. The property is sold free and clear of any and all rights of dower, charge or lien upon the same, except that it is claimed by one Nehemiah N. Cornish (the defendant in this action) that he is the owner by assignment, of a mortgage made by Ichabod C. McIntosh to Miriam M. Kellogg, covering the premises in question, dated February 1st, 1878, to secure the payment of $2,500, which mortgage was recorded in Oneida county clerk's office February 13th, 1878, and is a second lien upon said mortgaged premises. Cornish has not been made a party defendant in this action." The plaintiff bid off the property known as the Tavern farm, and the referee on the same day executed to her a deed, and very soon thereafter she went into possession. The sale was confirmed on the 6th of April, and on April 9th this action for a strict foreclosure was brought. The other farms were bid off by other parties, who have not been made defendants in this action. The plaintiff has recovered a judgment which, as modified by the General Term, decrees: 1st, that the defendant's mortgage is an existing lien on the lands purchased by the plaintiff upon the foreclosure of her mortgage, and was not affected by such foreclosure because not made a party to the action; 2d, that if the defendant desires to redeem the land bid off by the plaintiff upon her mortgage, he shall within ten days from the service of a copy of the judgment, give the plaintiff notice of his desire and intent to do so. If such notice is not given within the time specified, it is ordered and adjudged that the defendant and all persons claiming under him, do stand and be forever barred and foreclosed of and from all right, title, interest and equity of redemption of, in and to such premises, and all liens which he may have had thereon at the time of the commencement of the foreclosure action, by virtue of his mortgage or otherwise, are to be adjudged as cut off and foreclosed, and the

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plaintiff shall hold the title thereto, free from such liens, and the defendant shall pay the costs of the action; 3d, if the defendant gives notice of his intention to redeem, within the time required, the plaintiff may apply on notice to the Special Term, for the appointment of a referee, to take and state the account of the plaintiff, and to determine her interets in the mortgage debt, as applicable to the lands bid off by her, and the referee's report shall be made up according to certain directions contained in the judgment, and shall fix and determine the amount the defendant shall be required to pay upon such redemption, and the amount so found due by the referee, with the interest thereon, shall be paid by the defendant within six months from the service of a copy of the report, and if paid within such time, the payment shall operate as a redemption of the premises from the plaintiff's mortgage, and her title acquired by the sale shall become vested in him, and she shall, by a proper conveyance, convey the premises to him free and clear from the lien of her mortgage, and neither party shall have costs of the action; but if the defendant fails to complete the redemption in the manner, and within the time specified, it is ordered and adjudged that the lien of his mortgage is cut off and removed, and the plaintiff is deemed to hold the premises free and clear of such lien, and the defendant shall pay the costs of the action.

The material facts are not disputed, and we are of the opinion that upon the proofs submitted and the findings of the trial court, the plaintiff was not entitled to the relief granted to her in this judgment.

The equitable remedy known as a strict foreclosure of a real property mortgage, has never been recognized in this state, save in a very limited class of cases.

In England it was the prevailing method of procedure, until the enactment of the statutes of 15 and 16 Victoria, ch. 86 (sec. e8), known as the Chancery Improvement Act. It had its root in the common-law doctrine that, upon the execution of the mortgage, the mortgagee acquired the fee of the land, and upon default in payment, a right to the possession, and the mortgagor had no estate or interest therein, and no right of possession, after default had been made in the payment of the mortgage debt. The mortgagee's remedy was by ejectment, and in a court of law it was not an available defense for the mortgagor to plead that he was willing and ready to pay the debt, if he had once suffered a default to occur. In order to mitigate the hardships of this relation, equity permitted the mortgagor and his privies to redeem by discharging the mortgage debt, and by restoring to him the possession of the land if the mortgagee had taken possession. As it might be uncertain whether the mortgagor or subsequent lienors would ever avail themselves of the right of redemption, it was, while outstanding, a serious impediment

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to the alienation of the mortgaged property, and equity would, therefore, entertain an action to compel the parties entitled to this right, to exercise it by paying within a reasonable time, the amount of the mortgage debt, or be forever barred or foreclosed of the right of redemption; and in case of redemption, the decree provided that the mortgagee should reconvey the lands to the mortgagor, or other party redeeming.[1]

This proceeding has been termed a strict foreclosure, but it is apparent that it has no appropriate place in a system of laws and jurisprudence where it has been declared that the mortgage does not operate as a conveyance of the legal title, but is only a chose in action constituting a lien upon the land as security for the debt or other obligation of the mortgagor. The courts of this state have refused to adopt it as an authorized remedy in ordinary cases, and in this respect have followed the practice of the civil, rather than the common law. In the Am. & Eng. Encyclopaedia of Law (Vol. 8, 186-7, tit. Foreclosure) it is stated that strict foreclosure is very rarely resorted to in the American courts; that in a large majority of the states it is not recognized; that in two it is the usual mode of procedure; and that in six of the states, including New York, it is permitted in exceptional cases.

The plaintiff here rests her rights to this remedy principally upon the fact that she was the owner of a prior mortgage, which she had foreclosed, and that she became the purchaser of a part of the mortgaged property at the foreclosure sale, and that the defendant's subsequent mortgage was not cut off or affected by the foreclosure, because she did not make him a party to the foreclosure action. Before the sale occurred she had full knowledge that the defendant was the owner of the second mortgage, and leave was given her by the court to make him a party to the action, and so conclude him by the judgment, which she declined to accept, but caused the sale to proceed, and purchased the property upon such terms that both expressly and in legal effect, her purchase was subject to the lien of the defendant's mortgage.

Under such circumstances no case was made for a resort to this unusual, exceptional and severe remedy. It is insisted that, under the provisions of the Civil Code relating to foreclosure actions, such a judgment as the one entered herein cannot be rendered in any case; but it is unnecessary to determine that question upon this appeal. We may assume that, in a proper case, jurisdiction still exists to relieve a purchaser at a foreclosure sale, who finds that, by reason

[1] In Goodman v. White, 26 Conn. 317, Storrs, C. J., speaking of strict foreclosure, said, "All that is formally done is the extinguishment of the right (of redemption), the interposition of a perpetual legal bar against the party foreclosed. Such is the plain, literal meaning of the terms used. The decree only professes to close a door, which equity had before kept open."

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of some defect in the proceedings, the lien of a subsequent incumbrance has not been extinguished; but the facts here shown are not sufficient to authorize the exercise of that jurisdiction. We think that in such cases the purchaser must show that he purchased in good faith, relying upon the regularity and sufficiency of the foreclosure proceedings, and that the subsequent lienor had knowledge of the sale, and permitted the purchaser to make the purchase, without disclosing the existence of his incumbrance, or calling attention to the defect in the proceedings. In 2 Jones on Mort. (Sec. 1540, p. 421), it is stated that a strict foreclosure is proper "where a mortgagee or purchaser is in possession under a legal title from the mortgagor, for the purpose of cutting off subsequent liens or incumbrances, as in case one has purchased in good faith at a mortgage sale, which is not conclusive against some incumbrancer not made a party to the suit, and the purchaser has gone into possession." The cases have been very rare in this state where the remedy has been invoked, but we fail to find a case where it has been applied to relieve a party who buys with full knowledge of the outstanding incumbrance and subject to it. * * *

As to this defendant, the plaintiff is only a mortgagee in possession. It is true she has also acquired the title of the mortgagor and has extinguished the liens of all other incumbrancers, who were made parties to the foreclosure action.

But she occupies no better position with respect to the defendant than if she had taken a deed from the mortgagor and an assignment of the other incumbrances and had gone into possession. As to the defendant, her mortgage is still unforeclosed, and the estate, which the mortgagor had when he executed the defendant's mortgage, is still subject to its lien. The plaintiff may at any time foreclose her mortgage, as against the defendant, notwithstanding the former defective foreclosure (Brainard v. Cooper, 10 N. Y. 356; Walsh v. Rutgers Fire Ins. Co., 13 Abb. Pr. 33; Franklyn v. Howard, 61 How. Pr. 43.) It imposes no hardship to require her to pursue such course if she wishes to rid the title of the lien of defendant's mortgage. She will be as fully protected upon such a foreclosure had she made him a party to it.

The plaintiff may have the ordinary decree of foreclosure against the defendant in this action if she so desires, and all persons who are necessary parties defendant are brought in. It is not seen how any relief can be afforded without the presence of the purchasers of the other two parcels of the mortgaged premises. If it is sought to re-foreclose plaintiff's mortgage, they are unquestionably necessary parties, as the owners of separate portions of the property mortgaged, and by their purchases they have respectively acquired an interest in plaintiff's mortgage. If the court is asked to apportion either the plaintiff's or the defendant's mortgage between the

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three farms, they are necessary parties to a determination of that question. They would not be bound by any judgment rendered in this action which adjudged the extent of the lien of either mortgage upon their respective properties, and such adjudication would be necessarily involved in the ascertainment of the amount of either mortgage equitably chargeable upon the several parcels. In such a case the objection of a defect of parties is available, although not raised by demurrer or answer. The plaintiff is not entitled to the equitable relief sought, if it appears that a complete determination of the controversy cannot be had without the presence of other parties, and the court must direct them to be brought in (Code, sec. 452); and where it appears upon appeal that this has not been done, the court will reverse the judgment, although the issue is not made by the pleadings (Bear v. Am. Rapid Tel. Co., 36 Hun, 400). If the plaintiff obtains leave to amend by bringing in all necessary parties, she may have a decree for a foreclosure of her mortgage as against the defendant, and a sale of the mortgaged premises, in which decree the equities of the different purchasers, as between themselves, can be properly adjusted, and the court can direct the application of the net rents and profits upon the mortgage debt, in ascertaining the amount which the plaintiff and her co-owners of the mortgage are entitled to receive upon a sale of the property. In general terms, we think this is the extent of the relief to which she is entitled under the pleadings and proofs in this action.

* * * * * * *

The judgment must, therefore, be reversed, a new trial granted if plaintiff elects within sixty days after filing the remittitur in the court below to proceed with the action, and applies for leave to amend by bringing in the necessary parties. If such leave is not applied for or granted the complaint is dismissed, with costs in this court and in all courts; if leave to amend is granted, costs in this court to abide the determination of the Supreme Court as to the conditions upon which leave to amend may be granted.

All concur.

Judgment accordingly.[2]

[2] Compare, Illinois Starch Co. v. Ottawa Hydraulic Co., 125 Ill. 237; Shaw v. Heisey, 48 Iowa 468.

By a strict foreclosure the debt is satisfied to the extent of the value of the land but no further, and for any excess of the debt over the value of the property an action at law may be maintained against any party who is personally liable for the debt. If the value of the property exceeds the amount of the debt, the mortgagee is under no obligation to refund, the mortgagor's only protection against such a loss of his property being by redemption before the foreclosure is complete. Spencer v. Hartford's Exrs., 4 Wend. (N. Y.) 381; Devereaux & Meserve v. Fairbanks, 52 Vt. 587.

"Akin to strict foreclosure in equity, as vesting in the mortgagee an absolute estate in the land itself, is foreclosure by the peaceable

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SAN FRANCISCO v. LAWTON.

SUPREME COURT OF CALIFORNIA, 1861.
18 Cal. 465.

FIELD, C. J., delivered the opinion of the Court, COPE, J., concurring.

The object of the suit to foreclose a mortgage, under our law, is to obtain the sale of the estate which the mortgagor held at the time he executed the mortgage, and the application of the proceeds of the sale to the payment of the demand, for the security of which the mortgage was given. All persons who are beneficially interested, either in the estate mortgaged or the demand secured, are proper parties to the suit. This rule, as a general thing, will only embrace the mortgagor and mortgagee, and those who have acquired rights

entry of the mortgagee upon the premises, and his retention of possession thereafter for a specified time. This is provided for by the statutes of Maine, Massachusetts, New Hampshire and Rhode Island. (1 Stimson's Am. St. Law, § 1921. See 2 Jones, Mortgages, § 28.)

"The entry must be in the presence of witnesses, whose certificate as to the entry is filed for record, and this serves as notice to the owner and persons interested in the land. (Thompson v. Kenyon, 100 Mass. 108; Bennett v. Conant, 10 Cush. (Mass.) 163; Snow v. Pressey, 82 Maine 552; Thompson v. Ela, 58 N. H. 490.) The statutes require that the entry be peaceable, and, if it is opposed, judicial proceedings must be resorted to. (Rev. Laws Mass. 1902, chap. 187, § 1; Rev. St. Maine 1883, chap. 90, § 3; Gen. Laws R. I. 1896, chap. 207, § 3; Pub. St. N. H. 1901, chap. 139, § 14.)

"The severity of foreclosure in this way without a sale is mitigated by provisions of the statutes giving a considerable time after entry in which the property may be redeemed; this being three years, except in New Hampshire, where it is one year. (1 Stimson's Am. St. Law, § 1921.) The effect of the foreclosure is to cancel the mortgage debt to the extent of the value of the land at the time at which the foreclosure is completed. (Hatch v. White, 2 Gall. (U. S.) 152, Fed. Cas. No. 6,209; Morse v. Merritt, 110 Mass. 458; Hunt v. Stiles, 10 N. H. 466; Flint v. Winter Harbor Land Co., 89 Maine 420; Newall v. Wright, 3 Mass. 138.)

"In Maine, Massachusetts, and New Hampshire, the mortgagee may bring a writ of entry for the purpose of foreclosure. This proceeding, though in form a common-law action, has, when used for the purpose of foreclosure, the general characteristics of an equity proceeding, the amount due being ascertained on equitable principles, and the judgment being that, if this sum is not paid within a certain time, the mortgagee shall be put into possession of the land. (Holbrook v. Bliss, 9 Allen (Mass.) 69; Ladd v. Putnam, 79 Maine 568; 2 Jones, Mortgages, chap. 29.) When so put into possession, the mortgagee is in the position of a mortgagee who has peaceably entered without action, and possession by him for the length of time required in such case, as stated in the preceding section, will give him an indefeasible title. (1 Stimson's Am. St. Law, § 1925 (A) (3), (C) (2); 2 Jones, Mortgages, § 1306.)" Tiffany, Real Property, §§ 551, 552.

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or interests under them. Where prior incumbrancers are made parties, it is only for the purpose of liquidating the amount of their demands, and paying them out of the proceeds of the sale. Adverse titles to the premises held by parties claiming by conveyance from the mortgagor prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination in the suit. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance. (Eagle Fire Co. v. Lent, 6 Paige, 637; Corning v. Smith, 2 Seld. 82; Holcomb v. Holcomb, 2 Barb. 23.) The foreclosure operates, except in a single instance, only upon the estate or interest which the mortgagor possessed at the time, and the sale under the decree passes, with the like exception, only such estate or interest. The exceptional instance, to which we refer, arises where the mortgagor has, subsequent to the execution of the mortgage, acquired a title which enures, by way of estoppel, to the benefit of the mortgagee. In such case, the foreclosure operates upon the subsequently acquired title to the same extent as if originally held by the mortgagor, and the sale under the decree passes it. In all other cases, the estate mortgaged is the only estate brought under the consideration of the Court, and the only estate affected by its decree. (Clark v. Baker, 14 Cal. 612.)

In the present case, the defendants, Howard, Perley, Gould and Smith, who alone appeal from the decree, set up in their answer title to a portion of the mortgaged premises, under a grant from the former Mexican Government, bearing date in May, 1839, and a patent of the United States, issued upon its confirmation, in March, 1858, and also under a deed executed by the tax collector of the city and county of San Francisco, upon a sale for unpaid taxes for state and county purposes, for the fiscal year ending in June, 1856. On the trial, they produced the patent, and traced title thereunder to the defendants Howard and Perley. They also produced the tax deed, and traced title thereunder to Perley. The record does not disclose any evidence of title in either Gould or Smith under the patent or the tax deed. Of the value of the titles conferred by those instruments, it is unnecessary to express any opinion. Their validity is not the proper subject of determination in the present suit. It is only necessary to look into them so far as to see that they are asserted in good faith, and are not mere pretenses for delay; and this being seen, the rights of the defendants Howard and Perley should have been reserved in the decree. If there were no other reasons than the assertion of these adverse titles for making them parties, the suit should have been dismissed as to them. But there were other reasons. Mowry, the mortgagor, subsequent to the mortgage, sold and conveyed all his right, title, and interest in the premises to Sawyer, and Sawyer quitclaimed a portion of the premises to Howard, Perley and Thorne,

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and the balance to Perley alone. Thorne subsequently conveyed his interest to Gould and Smith. The appellants thus succeeded to whatever estate the mortgagor possessed, and as such successors were proper and necessary parties to the foreclosure. (Goodenow v. Ewer, 16 Cal. 461; Boggs v. Hargrave, *id.* 559.) The estate thus acquired, whatever it may have been, was subject to foreclosure and sale under the decree of the court. This the appellants do not question; but Howard and Perley, who claim under the patent and tax deed, insist that they are not estopped by the acceptance of the quitclaim of Sawyer from denying that he ever possessed any estate—that is, title or interest in the premises—and from showing that the legal title derived from an independent and paramount source was in fact in them at the time; and in this position they are undoubtedly correct. The evidence of Sawyer shows that at the time he executed the quitclaim, Howard, Perley, and Thorne claimed to hold an adverse title to the premises, and demanded possession, and threatened a suit in ejectment against him, and that with his conveyance he acknowledged their title. It is not material that such threat was made or acknowledgment had, but they furnish an illustration of the good sense of the rule which permits a vendee to dispute the validity of the title of his vendor. Parties possessing undoubted titles may often find it to their interest to buy out settlers and trespassers on their premises rather than incur the delay and expense of establishing their rights by litigation. It would be strange if, under such circumstances, they should be estopped from denying the title of the grantors; and if a grantor had previously executed a mortgage upon the premises, that their rights under their previous titles should be subordinate to those of the mortgagee. The law does not even look that way. A quitclaim deed only purports to release and quitclaim whatever interest the grantor possesses at the time. He does not thereby affirm the possession of any title, and he is not precluded from subsequently acquiring a valid title, and attempting to enforce it. If he does not possess any title, none passes; and he may subsequently deny that any passed, without subjecting himself to any imputation of a want of good faith. * * *

* * * * * * * *

There are several other objections taken by the appellants to the action of the court below, but upon them we express no opinion. With a clause in the decree saving to the appellants their rights under the patent and tax deed, it is not probable that they will feel disposed to press the objections. On the further hearing it will not be necessary to take anew the testimony. The parties can use that

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already embodied in the transcript, and add such further testimony as they may deem essential to the proper presentation of the case.

Judgment reversed, and cause remanded for further proceedings.[8]

BRAINARD v. COOPER.

COURT OF APPEALS OF NEW YORK. 1852.
10 N. Y. 356.

Appeal from the Supreme Court. Bill filed by the plaintiff in the late court of chancery, to redeem certain land from a mortgage executed on the 29th December, 1830, by Charles Giles to the New York Life Insurance and Trust Company for $720. On the 18th

[8] Accord: Sommers v. Bromley, 28 Mich. 125; Banning v. Bradford, 21 Minn. 308.

So, a bill alleging that a defendant claims an interest adverse to that of the mortgagor is demurrable. Dial v. Reynolds, 96 U. S. 340. But, if the bill alleges that a defendant claims an interest subordinate to the mortgage, and the defendant sets up an adverse claim, an adjudication upon the adverse claim, though erroneous, is not void or subject to collateral attack. Hefner v. Northwestern Mut. Life Ins. Co., 123 U. S. 747; Palmer v. Yager, 20 Wis. 91. Yet, if the pleadings frame no issue as to paramount claims a decree foreclosing the interests of the parties defendant in general terms will not affect the defendant's claim of title paramount, the decree being construed as affecting only interests which were properly litigable in the suit. Lewis v. Smith, 9 N. Y. 502; Strobe v. Downer, 13 Wis. 10.

The same principles have, by some cases, been applied to parties who claim, as grantees or encumbrancers, through the mortgagor, but assert priority over the mortgage being foreclosed, such, for example, as prior mortgagees; Jerome v. McCarter, 94 U. S. 734; Emigrant Industrial Sav. Bank v. Goldman, 75 N. Y. 127; Strobe v. Downer, 13 Wis. 10; and even to subsequent purchasers who claim priority by virtue of the recording acts; Cady v. Purser, 131 Cal. 552. On the other hand there is good authority for the position that the question of priority between a mortgagee and other claimants from the mortgagor may properly be tried out in the foreclosure suit. Stevenson v. Texas &c. R. Co., 105 U. S. 703; Brown v. Volkening, 64 N. Y. 76; Bisbee v. Carey, 17 Wash. 224; Campbell v. Bane, 119 Mich. 40. The latter case is, like Cady v. Purser, 131 Cal. 552, that of a subsequent claim for which priority was asserted under the recording acts. See also, Goodwin v. Tyrrell, 8 Ariz. 238. There is also authority for the position that one who is admitted to be a prior lienor is, as such, a proper party; Judson v. Emanuel, 1 Ala. 598; Clark v. Prentice, 3 Dana (Ky.) 468; at least for the purpose of determining the amount of his lien so that a sale subject thereto can be intelligently made; Bexar Bldg. Loan Assn. v. Newman, 86 Tex. 380; Foster v. Johnson, 44 Minn. 290; Missouri, K. & T. Trust Co. v. Richardson, 57 Nebr. 617; Sutherland v. Lake Superior Ship Canal Co., Fed. Cas. No. 13643; and it is universally conceded that a prior encumbrancer, whose claim is due and payable, may be joined as defendant with a prayer that his lien be foreclosed in the same

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May, 1832, Samuel and Schureman Halstead recovered a judgment in the Supreme Court against Giles for $3,500, which was duly docketed. On the 18th August, 1832, the plaintiff recovered a judgment in the Supreme Court against Giles for $610, which was duly docketed. No sale had ever been had under this judgment. On the 2d October, 1833, one William H. Halstead, to whom the mortgage had been assigned, filed his bill for the foreclosure thereof, to which Samuel and Schureman Halstead, and other judgment creditors of Giles, were parties; but the plaintiff, in this case, was not. The usual decree of foreclosure and sale was made and the land duly sold under it to Schureman Halstead, who purchased for the joint benefit of himself and Samuel Halstead, and received the master's deed April 16, 1834. The purchase price was $800, less than the amount of the mortgage and costs. On the 20th October, 1838, Schureman Halstead, for the consideration of $1,200, conveyed the premises to one Hall. On the 4th January, 1839, Giles executed a quit-claim deed to Hall, and Hall on the 13th April, 1841, sold and conveyed the land to the defendants in this suit. On the 4th July, 1842, the plaintiff offered to redeem the premises by paying the defendants the amount due on the mortgage and made a tender for that purpose; which being refused, he instituted this action on the 20th July, 1842, claiming to redeem upon paying the amount due upon the mortgage with interest, and the value of all permanent improvements made upon the premises, deducting the rents and profits received by the defendants, and praying for an account, &c. The cause was heard before Vice-Chancellor Gridley, of the fifth circuit, who made a decree in accordance with the prayer of the bill, except that it gave the defendants the alternative of paying the plaintiff's judgment, if they should so elect. This decree having on appeal been affirmed by the Supreme Court at general term in the fifth district, the defendants appealed to this court.

suit and paid first out of the proceeds of sale, the proceeding being considered, as to him, as a bill to redeem from his senior lien. Jerome v. McCarter and Emigrant Industrial Sav. Bank v. Goldman, supra; Hudnit v. Nash, 16 N. J. Eq. 550.

There is a difference of opinion as to whether one who holds a tax title, subsequent to the mortgage but paramount by reason of being derived directly from the sovereign authority, is a proper party. Hefner v. Northwestern Mut. Life Ins. Co., 123 U. S. 747, and cases cited therein.

It should be observed that the exclusion from the foreclosure suit of questions concerning the title of the mortgagor or the priority of claims under him, whatever justification it may have, has the unfortunate result of requiring a sale of a very uncertain quantity, largely defeating the purpose of the change from strict foreclosure to that by sale. See Sutherland v. Lake Superior Ship Canal Co., Fed. Cas. No. 13643; Hefner v. Northwestern Mut. Life Ins. Co., 123 U. S. 747. It would seem that a way might be found out of the difficulty by directing an issue to be tried at law.

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GARDINER, J.: Chancellor Kent, in his commentaries, remarks that the right of redemption exists, not only in the mortgagor himself, but in every other person who has an interest in, or a legal or equitable lien upon, the mortgaged premises; and that consequently every judgment creditor, and every other incumbrancer may redeem. (4 Kent Com., 162.)

Judge Story says (2 Story Eq., § 1023) that a judgment creditor and every other person being an incumbrancer, or having a legal or equitable title or lien on the lands, may insist upon a redemption of the mortgage.

It is a right inherent in the land binding all persons coming in under the mortgagor, 1 Powell on Mort., 251, Comyn's Dig., Mort., tit. 156, sec. 94. It rests upon a principle of natural justice that every person having an interest in the mortgaged premises may protect and render it effectual by a redemption of the mortgage, thereby becoming substituted to the rights and interest of the original mortgagee. (Story Eq., § 1021.) It is a valuable right, of which no one can be deprived against his consent, without due process of law affording to him an opportunity of exercising it if he deems it advantageous to his own interest.

It is immaterial whether the lien or interest is legal or equitable, or whether the equity of redemption, considered as an estate, is of one character or the other.

These principles, if sound, and they have heretofore been supposed elementary, dispose of this case.

Wm. Halstead was the owner of a mortgage, which was a specific and prior lien upon the mortgaged premises. I shall call him mortgagee for convenience. The respondent, as creditor by judgment, was a junior incumbrancer, with a general and legal lien, upon the same lands. Before foreclosure he had the right to redeem the mortgage. The exercise of the right is now indispensable to protect his interest, as his lien will expire before a sale by execution could be effected. His sole remedy is a redemption.

The foreclosure of the mortgage without making the complainant a party, was, it is conceded, as to him a nullity. The relation theretofore existing between the parties was unchanged by that proceeding, and was consequently subsisting in its full force at the time when the complainant offered to redeem, and at the time of the commencement of this suit.

But it is said that by the sec. 158, 2 R. S., 192, the deed executed by the master on sale by virtue of the decree, is declared to be "as valid as if the same were executed by the mortgagor and mortgagee." But as against whom is this effect given to the conveyance? The statute proceeds to declare "it shall be an entire bar against each of them (the mortgagor and mortgagee) and against all parties to the suit in which the decree was made," &c. No others are af-

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fected. But the statute does not stop here. The same section provides "that the deed shall vest in the purchaser the same estate, and no other or greater than would have vested in the mortgagee if the equity of redemption had been foreclosed." The effect of a strict foreclosure was merely to extinguish the right of redemption. The mortgagee obtained and held his estate, and all of it by virtue of the mortgage. The foreclosure barred the mortgagor and all other parties to the suit from ever after demanding a conveyance or surrender of that estate from the mortgagee. As to all the world the latter was but a mortgagee; and the only difference between those made parties to the suit and those not parties, was, that the former lost the right of redemption, which remained to the latter. (Watson v. Spence, 20 Wend., 262, 263.) This estate, that of a mortgagee after foreclosure, the statute in this case vested in Schureman Halstead as purchaser under the decree, and no "other, or greater." The deed of the master by which it was conveyed, was an entire bar against the mortgagee who had instituted the proceedings, and received value for his interest, and against the mortgagor, and subsequent incumbrancers made parties, whose right of redemption was extinguished, as if the same had been by them severally executed.

This was its effect as a bar between those parties. But the sale did not vest in the purchaser the estate of the mortgagor, and make the former an assignee of the mortgage at the same time; but the estate and interest, one and indivisible, prescribed by the statute, namely, "that which would have vested in the mortgagee, if the equity of redemption had been foreclosed." According to the statute therefore, as well as by adjuded cases, it is clear that this foreclosure as against the complainant, a judgment creditor and not a party is utterly void. (3 J. C. R., 465; 4 Kent, 184; 2 Seld., 562, 565.) It follows, that as to the mortgagor and all other parties to the suit, a mortgagee by the foreclosure obtains what is equivalent to a fee in the mortgaged premises. As to the judgment creditor not a party, the mortgagee (or purchaser at the master's sale who succeeds to his rights) remains in possession as such, with a mere lien for his debt, liable consequently to account for the profits, and either to pay off the demand of the redeeming creditor, or on receiving the mortgage debt to convey to him the premises as the only thing representing the mortgage in his power to transfer.

But it is said, in the second place, that a naked judgment lien in this state, is not a sufficient title for the redemption of a prior incumbrance.

As this doctrine is in opposition to the principle laid down by every elementary writer, some authority must be shown to warrant the exception, and none such can be found. We are referred to 9 J. R., 612; Coote on Mortgages, 514; and Powell on Mortgages, 331. It is there said, "that no person can come to a court of equity,

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for a redemption of a mortgage, but he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him."

But a judgment creditor having a lien has a subsisting interest under the mortgagor, within the letter and spirit of the rule, as held by Powell, and every other writer. (Powell on Mortg., 271, 274, note o.)

* * * * * * * *

In Benedict v. Gilman (4 Paige, 58), the mortgage which was the first lien, had been foreclosed at law, and the premises bid in for the complainant, who filed his bill against Gilman, a subsequent judgment creditor, to compel him to redeem or stand foreclosed. Decree accordingly.

This, like the case in Hopkins, R., is directly upon the point in controversy. By the foreclosure the mortgagor was barred of his equity of redemption, precisely as in the present case. The bill then called upon the judgment creditor, who had neither issued execution nor sold the land, to redeem or to forfeit all his rights. According to the doctrine put forth in this case, the creditor had no right to redeem; and yet, by a decree of the chancellor, he was compelled to exercise a right which he did not possess, or be foreclosed forever.

There are numerous cases in our reports which have not been cited, and to which I shall not refer, as they only recognize the general principle laid down in elementary writers. I conclude by expressing my belief that, within the last one hundred years, no decision of any court, no dictum of any equity judge, nor a suggestion of counsel in any case involving the question, can be produced to sustain the position, that a judgment creditor having a lien upon mortgaged premises, is not entitled to redeem without the issuing of an execution and sale of the land, or either of them.

I think the judgment should be affirmed.[4]

Johnson, Jewett and Watson, Js., concurred.

Ruggles, Ch. J., Wells and Morse, Js., were for reversal.

Five judges not concurring on the second re-argument, the judgment was affirmed by force of the statute, Code, sec. 14.

[4] Compare, Wiley v. Ewing, 47 Ala. 423; Hosford v. Johnson, 74 Ind. 479; Alexander v. Greenwood, 24 Cal. 505; Harris v. Hooper, 50 Md. 537; Farwell v. Murphy, 2 Wis. 533.

"In respect to the defendants in foreclosure suits, they are either necessary or proper parties. A necessary party is one whose presence before the court is indispensable to the rendering of a judgment which shall have any effect upon the property; without whom the court might properly refuse to proceed, because its decree would be practically nugatory. The person who in this sense is a necessary party defendant is the owner of the equity of redemption; but the ownership of the land subject to the mortgage may be distributed among several persons, one of whom is no more necessary to the rendering of an effectual judgment than another. Moreover the equity of redemption may have been conveyed again and more than once in mortgage, and

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COLLINS v. RIGGS.

SUPREME COURT OF THE UNITES STATES. 1871.
14 Wall. (U. S.) 491.

In this case, Riggs had brought ejectment in the court below against Collins to recover a lot, one of several mortgaged by Russell to the United States, and bought by Corcoran from the United States after the foreclosure by the government of their mortgage and the purchase in by them of all the several lots included in it. Riggs was the grantee of Corcoran.

The lot in controversy in this case had been conveyed previously to the mortgage, by a deed not put on record, to Breese.

On the trial, the defendant made the objection to Rigg's title, that Breese, as grantee of Russell, of the lot, prior to the date of the mortgage to the United States, and so owner of the equity of redemption,

the person who holds the title subject to the mortgages may have an interest which is in fact of no value, while the holders of the subsequent mortgages have valuable interests; yet according to the cases the owner of the unconditional title which is of no value is a necessary party, and the subsequent mortgagees are only proper parties. It is not, however, the value of the interest held by any one which in any way determines whether he is a necessary party or not; for although the interest of the owner of the equity may be valueless, yet a decree of foreclosure and sale is effectual in cutting off that interest, and in transferring the title subject to the rights of subsequent incumbrancers, if they have not been made parties. The decree is at any rate effectual in stopping the further transfer or incumbrance of the title, and this is doubtless the reason why the owner of the equity of redemption is regarded as a necessary party.

"In one sense every person who has acquired any interest in the property subsequent to the mortgage is a necessary party to the suit for foreclosure, whether that interest be by way of a mortgage or judgment lien, an inchoate right to tenancy in dower or curtesy or an unconditional estate in fee; because, in order to make the foreclosure complete, and to transfer a perfect title by the sale, it is necessary that the holder of every such right or interest should be brought before the court. A party may be necessary in this sense although this term has generally been used only to designate the present owner of the property, without whom the general ownership of the property can not be transferred by a sale under the decree. It is doubtless for this reason that there is much confusion in the cases as to the persons who are necessary parties to the suit. As a practical matter, however, the distinction between necessary and proper parties is not of much consequence; for the suit, though effectual in cutting off the estate or interest of the parties to it, is generally ineffectual as a foreclosure, unless every interest subsequent to the mortgage is cut off by the decree and sale under it; for if a stranger purchases, he may decline to take the title if any lien or right is left outstanding; and if the mortgagee himself buys he only subjects himself in such case to the expenses of another suit, to get rid of the rights that others still have in the property." Jones, Mortgages, § 1394.

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had not been brought into the foreclosure suit; and assuming this to be true the defendant inferred and assumed that the mortgage was still, therefore, in existence. He then offered to prove that during the pendency of the present suit in ejectment he had tendered to Riggs the amount for which this particular lot now in controversy had been struck off at the marshal's sale, together with the taxes, interest, and costs; informing the plaintiff at the time of this tender that he, the defendant, was willing to treat him, the plaintiff, as the equitable assignee of so much of the mortgage as had been paid at the sale for the land in controversy, and that he wished to redeem the said land, and that he, the defendant, made the tender for that purpose; which tender the plaintiff declined to receive; the defendant offering to prove, further, that the said sum of money was then paid into court as a tender to redeem the land in controversy from the mortgage.

The court below decided, simply, that the evidence as presented was not competent or sufficient to constitute a defense to the action, but upon what ground this decision was made did not appear.

MR. JUSTICE BRADLEY delivered the opinion of the court.

It is clear that the criterion by which the amount tendered was gauged was incorrect. To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase-money and pay the former the balance of his debt.

Judgment affirmed.[5]

[5] Compare, Wiley, Banks & Co. v. Ewing, 47 Ala. 423; Bradley v. Snyder, 14 Ill. 263; Martin v. Fridley, 23 Minn. 13; Renard v. Brown, 7 Nebr. 449.

One who, pending a suit to foreclose, acquires an interest in the equity of redemption from a party to the suit need not be made a party to the suit in order to cut off his interest. On general principles one who purchases pendente lite is bound by any judgment or decree that is subsequently rendered against the party from whom he derived his interest (with the qualification, of course, that in some states the statutory requirement of filing of notice of lis pendens must have been complied with). Warford v. Sullivan, 147 Ind. 14; Smith v. Davis, (N. J.) 19 Atl. 541; Fuller v. Scribner, 76 N. Y. 190. And see Littlefield v. Nichols, 42 Cal. 372.

One who acquires an interest in the equity of redemption before foreclosure suit is commenced, by a conveyance which is not recorded until after foreclosure is commenced, is bound by the decree, though not a party, as against a purchaser at the foreclosure sale who had no notice of such outstanding right, either actual or constructive; Duff

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SMITH v. SHAY.

SUPREME COURT OF IOWA. 1883.
62 Iowa 119.

This is an action in equity for the redemption of lands sold under the foreclosure of a mortgage. The facts are as follows: On the 11th day of September, 1874, Daniel Burns executed to the defendant, Walter Shay, a mortgage on the lands in controversy. In June, 1878, said Burns executed to plaintiffs a mortgage on the same lands. The defendant, Shay, foreclosed his mortgage by an action in the United States circuit court, and on the 11th day of February, 1880, obtained a master's deed to said lands, in pursuance of such foreclosure. Plaintiffs were not made parties to such foreclosure suit. The plaintiffs foreclosed their mortgage by an action in the district court of Shelby county, Iowa, to which action Shay was not made a party. On the 12th day of February, 1880, one day after the date of the master's deed to Walter Shay, the sheriff of Shelby county executed to plaintiffs a sheriff's deed to said lands. March 1, 1880, defendant, Shay, made a contract with the defendants, Frank & Elmendorf, giving them the right to lease or sell said lands, by which they were to have an interest in the proceeds thereof if they effected a sale. March 25, 1881, Frank & Elmendorf sold said lands to Thomas Jones, who now claims to be the owner thereof.

The defendants, Jones and Frank & Elmendorf, filed an answer, in which they ask that they may be allowed to redeem from the plaintiffs' mortgage. The court decreed that the defendants, Thomas Jones and Frank & Elmendorf, be allowed to redeem said premises by paying into the hands of the clerk, on or before October 1, 1882, the sum of $1,131.10, with interest from the date of the decree at the rate of ten per cent., and that, if the defendants fail to make such redemption within the time named, the plaintiffs may redeem, by paying to the clerk for the use of defendants, on or before No-

v. Randall, 116 Cal. 226; Shippen v. Kimball, 47 Kans. 173; Woods v. Love, 27 Mich. 308; Ehle v. Brown, 31 Wis. 405; but possession may under some circumstances be equivalent to record; see the case last cited and Noyes v. Hall, 97 U. S. 34; Hodson v. Treat, 7 Wis. 263.

There is authority for the proposition that notice to the mortgagee, after suit is begun, of a right acquired before suit begun, does not make it incumbent upon the mortgagee to make such claimant a party. Boice v. Michigan Mut. Life Ins. Co., 114 Ind. 480; Leonard v. New York Bay Co., 28 N. J. Eq. 192; Hager v. Astorg, 145 Cal. 548. This doctrine would protect a purchaser at the foreclosure with full knowledge of the facts. However this may be, and even where the mortgagee has notice before commencing suit, the purchaser without notice, actual or constructive, of such unrecorded conveyance is fully protected, since he is a "purchaser" within the meaning of the recording acts and the unrecorded conveyance is therefore void as to him.

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vember 1, 1882, the sum of $1,125, with interest from August 22d, 1882, the date of the decree, at ten per cent. Both parties appeal.

DAY, CH. J.: I. The plaintiffs hold and claim under the junior mortgage. They were not made parties to the foreclosure suit of the Shay or senior mortgage. It is conceded by the defendants that their right of redemption was not barred by the decree and sale under the senior mortgage. It is claimed, however, that their right to redeem is not an absolute one, and that defendants can prevent the exercise of that right by themselves redeeming from plaintiffs. This view was adopted by the court below, and it is, we think, correct. In 2d Jones on Mortgages, 2d Ed., section 1075, it is said: "A junior incumbrancer, who, not having been made a party to a foreclosure of a prior mortgage, afterwards redeems, redeems not the premises, strictly speaking, but the prior incumbrance, and he is entitled, not to a conveyance of the premises, but to an assignment of the security. Therefore, if the prior mortgagee in such case has become the purchaser at the foreclosure sale, and has thus acquired the equity of redemption of the mortgaged premises, the junior mortgagee upon redeeming is not entitled to a conveyance of the estate, but to an assignment of the prior mortgage; whereupon the prior mortgagee, as owner of the equity of redemption, may, if he choose, pay the amount due upon the junior mortgage, redeeming that." See also Pardee v. Van Anken, 3 Barb. 534; Renard v. Brown, 7 Neb. 449. In our opinion the court did not err in giving the defendants the paramount right of redemption.

* * * * * * * *

The plaintiffs will pay the costs of appeal. With the modification above indicated, [as to the accounting] the judgment is

Affirmed.[6]

PEABODY v. ROBERTS.

SUPREME COURT OF NEW YORK. 1866.
47 Barb. (N. Y.) 91.

This action was brought to foreclose a mortgage given by Jared D. Howe to the plaintiff, on the 14th day of October, 1836, to secure the payment of $440 and interest annually, according to the condition of a bond at the same time executed by Howe and delivered to the plaintiff. By the condition of the bond, the principal sum secured became due and payable on the 1st of January, 1838. The premises described in the mortgage were situate in Genesee county,

[6] Accord : Murphy v. Farwell, 9 Wis. 102.

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and the mortgage was duly recorded in the office of the clerk of that county, on the 16th of June, 1837.

It was alleged in the complaint, and proved upon the trial, that the mortgagor, on the 6th of December, 1836, executed and delivered to Elijah Turner another mortgage upon the same premises, to secure the sum of $1,244, besides interest. And that mortgage was recorded in the clerk's office of Genesee county on the 12th day of January, 1837. That mortgage was foreclosed by proceedings in the late Court of Chancery, and the premises described in it sold under a decree of that court, to the mortgagee, in 1839 and 1842. The plaintiff in this suit was not made a party to the action for the foreclosure of that mortgage. The defendants derived their title to the premises under Turner, who purchased them at the mortgage sale.

DANIELS, J.: Although the mortgage in suit was in fact the first incuumbrance on the premises in question, at the time when the mortgage under which the defendants derive their title was executed, that priority was presumptively lost by the omission to record it until after the second mortgage had been recorded. (Freeman v. Schroeder, 43 Barb. 618.) And that presumption must prevail against the plaintiff's mortgage, unless it can be overcome by evidence, in the manner sanctioned by law. Butler v. Viele, 44 Barb. 166.) And as no such evidence has been given in this case, his mortgage must be deemed to be, as it is in law, a second mortgage, though given before that which has acquired priority over it. But as such the mortgagee possessed the right to maintain an action upon it for the foreclosure of so much of the equity of redemption as remained in the mortgagor at the time when it was recorded, and for a satisfaction of the debt secured by it, by a sale of the mortgaged premises. This right has, from the time of the civil law, been secured to the mortgagee as an incident to, and growing out of, the mortgage itself. (2 Story's Eq. Jur., § 1024.) And it has been so generally assumed, and commonly sanctioned, as scarcely to have been drawn in question in courts of justice in this state. Hence it is laid down as an elementary principle, that a subsequent mortgagee may elect either to foreclose, or bring an action to redeem the prior mortgage. (1 Hilliard on Mortgages, 3d Ed. 332.) In the case of Cronin v. Hazeltine, (3 Allen, 324,) where the first mortgagee, under the laws of Massachusetts, had entered into possession of the mortgaged premises in the presence of witnesses, for the purpose of foreclosing his mortgage, it was held that the second mortgagee might still maintain an action for the foreclosure of his mortgage, and be placed temporarily in possession to render the foreclosure effectual. And in Norton v. Warner, (3 Edw. Ch. 106,) it was held that there is no objection to a second mortgagee's filing a bill for a foreclosure and sale to pay off all the incumbrances according to their respective priorities, or to redeem as respects prior mortgages,

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and then to sell in order to repay the redemption money, as well as to satisfy the subsequent incumbrances; and in such cases the practice formerly was to make all incumbrancers, whether prior or subsequent, parties. (2 Barb. Ch. Pr. 174.) It is very important for the promotion of the interests of junior mortgagees that this right should be carefully maintained; for where they do not possess the pecuniary ability of redeeming the senior mortgage, it is the only means afforded them through which the security can be applied to the payment of the debt it secures. This right is so important, in these cases, that the holder of the mortgage can not be deprived of it, without, at the same time, very sensibly impairing and depreciating the security created by the mortgage. And as such it is an essential attribute of property, which positive legislation, even, can not destroy without impairing the obligation of the contract out of which it arises. (McCracken v. Hayward, 15 Curtis, 228; 2 How. 609. Gantley v. Ewing, 15 Curtis, 608; 3 How. 708.) The general correctness of this doctrine is not denied in this case. But it is insisted that by a foreclosure and sale under the senior mortgage, this right may be lawfully extinguished without even making the junior mortgagee a party. How this result can be produced, consistently with the well settled rules of law, and the established and acknowledged principles of justice, it is difficult, if not altogether impossible, to conceive. For it is generally, if not universally, true as a legal proposition that no person can be affected or prejudiced by legal proceedings against property in which he has an interest, unless he, or those under whom he derives his title, were made parties to them. Whatever exceptions may be found to this general principle, it is believed they owe their existence to peculiar statutory provisions, none of which, however, apply to the present controversy. This principle is so thoroughly grounded in the early sources of constitutional law as now to have become one of its fundamental elements. And accordingly, the constitutions of the state and nation alike declare, that no person shall be deprived of his property without due process of law, which, according to the well settled legal definition of these terms, means, an action or legal proceeding against him, and not one against the party from whom he may have derived such property, after his rights have become vested. (Campbell v. Hall, 16 N. Y. Rep. 575.) Upon general principles, therefore, there can be no reason for depriving the junior mortgagee of his right to foreclose his mortgage, and sell the mortgaged premises, merely because they have been previously sold under a foreclosure of the senior mortgage without making him a party. And there is nothing whatever in the instrument creating the security, which should produce that result. Particularly as a mortgage, in this state, is well settled to be only a lien upon, and not a title to, the land. Under the construction which the English courts have given to mortgages, the

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rule of course must be different. For in those courts a mortgage is held to create an estate in the land which, after default in payment, can only be divested by a redemption in equity or a voluntary reconveyance from the mortgagee. (Harring v. Smythe, 2 Barb. Ch. 119.) On that account the only remedy which the mortgagor or subsequent incumbrancers have after the day of payment has passed, is that of a redemption in equity. And that remedy can be resorted to with the like effect after, as before, a foreclosure of the senior incumbrance, if the person resorting to it was not a party to the foreclosure. But whether before or after, his remedy is confined to a bill to redeem, so far as the previous incumbrance is concerned. On account of the difference in the legal effect of a mortgage, the rule of the English courts confining the remedy of the subsequent incumbrancer to a redemption in equity merely, is not entitled to be regarded as controlling authority by the courts of this state. * * *

* * * * * * * *

But this view of the effect of the foreclosure and sale under the senior mortgage, when the junior mortgagee was not made a party, does not depend alone upon these general principles. It is sanctioned by the adjudication of the Court of Chancery in the case of Vanderkemp v. Shelton, (11 Paige, 28). In that case the bill was filed to foreclosure a junior mortgage, after a foreclosure and sale under the senior mortgage without making the junior mortgagee a party; and the chancellor held the proceeding to be proper, and decreed a sale of the mortgaged premises.

* * * * * * * *

The judgment should be set aside and a new trial granted.

Grover, P. J., concurred in the result.

Davis, J., dissented.

Marvin, J., expressed no opinion.

New trial granted.[7]

LITTLEFIELD v. NICHOLS.

SUPREME COURT OF CALIFORNIA. 1871.
42 Cal. 372.

Appeal from the District Court of the Fifteenth Judicial District, County of Contra Costa.

This was an action of ejectment for three hundred and sixty acres of land, a portion of the San Pablo Rancho, in Contra Costa County.

[7] See also, Turner v. Phelps & Co., 46 Tex. 251; Alexander v. Greenwood, 24 Cal. 505.

Compare, Moulton v. Cornish, supra, and cases cited.

Compare, San Francisco Co. v. Lawton, supra.

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Both parties claimed under Joaquin G. Castro, in whose name the rancho was finally confirmed by the United States on February 24th, 1858, and final survey approved August 17th, 1864.

The plaintiff claimed as follows: On December 28th, 1854, Joaquin G. Castro executed a mortgage to Martina Perre of all his interest in the San Pablo Rancho, which was recorded on January 6th, 1855; on September 21st, 1855, suit of foreclosure was commenced upon the mortgage; on January 17th, 1856, there was a decree against defendant for nine thousand one hundred and fifty dollars, with interest at five per cent. per month; on March 11th, 1856, there was a sale by the Sheriff to Martina Perre for five thousand dollars; on March 23d, 1857, Sheriff's deed to Martina Perre, recorded March 24th, 1857; and there were divers mesne conveyances carrying this title to the plaintiff.

The defendant set up among other things, that John Currey recovered judgment against Joaquin G. Castro on October 23d, 1855, for three hundred dollars; docketed October 24th, 1855; execution on this judgment on October 26th, 1855; Sheriff's sale on November 29th, 1855, and Sheriff's deed on April 25th, 1863.

There having been a judgment for plaintiff, and motion for new trial denied, the defendant appealed.

By the Court, WALLACE, J.:

The title formerly held by Castro is the true title to the premises in controversy. The plaintiff claims to have acquired it, and the defendant claims that it is outstanding in a third person, who is not a party to the controversy. The title of the plaintiff relates to January, 1855, when the mortgage, through the foreclosure of which it comes, was recorded and became a lien. The outstanding title to October, 1855, when the Currey judgment against Castro, through which that title comes, also became a lien upon the premises.

The lien in which the plaintiff's title originated being thus the elder in its origin, a title derived thereunder is *prima facie* superior to a title from a common source, purporting to be derived under a judgment lien junior in point of time; and in an action of ejectment, where, as here, the controversy must turn upon the mere legal title, and no equitable defense is pleaded, the title originating in the elder lien must prevail over that originating in the junior lien, provided the lien of the former had not been suffered, in the meantime, to become dormant, or the proceedings through which it was foreclosed were not insufficient, in point of jurisdiction, for that purpose.

In Rankin et al., plaintiffs in error, v. Scott, defendant in error, 12 Wheat. 177, each party claimed to have acquired the title of John Little to the premises through judgments and Sheriff's sales, etc., resulting in a Sheriff's deed to each. These judgments respectively became liens upon the premises at different periods of time, and the sale under the junior judgment preceded that under the

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other. It was held that the sale under the elder judgment and lien gave the better title, notwithstanding such sale was itself subsequent in point of time to that made under the junior judgment. In delivering the opinion of the Court in that case Mr. Chief Justice Marshall said: "By that law (of Missouri) judgments are to be a lien on all the lands of the debtor. The lien commences with the judgment, and continues for five years. The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a Court of law or equity to a subsequent claimant. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution, has never been considered as such an act."

Upon these views it results that the plaintiff's title was superior to the outstanding title set up by the defendant; and the judgment is, therefore, affirmed.[8]

[8] See also, Penryn Fruit Co. v. Sherman-Worrel Co., 142 Cal. 643; State Bank v. Wilson, 9 Ill. 57; Bateman v. Miller, 118 Ind. 345; Briggs v. Chicago, K. & W. R .Co., 56 Kans. 526; Cook v. Detroit &c. R. Co. 43 Mich. 349; Renard v. Brown, 7 Nebr. 449; King v. McCully, 38 Pa. St. 76.

"The purchaser became vested with all of the estate which the complainant (the mortgagee) had in the premises by virtue of the mortgage." Baldwin v. Howell, 45 N. J. Eq. 519, 537. See, also, Davis v. Connecticut Mut. Life Ins. Co., 84 Ill. 508; Hart v. Beardsley, 67 Nebr. 145.

"The title of the purchaser in these sales in equity under foreclosure decrees takes effect by relation to the delivery of the mortgage as against all intervening purchasers and encumbrancers who are made parties or who become interested pendente lite." Graves, J., in Ruggles v. First Bank, 43 Mich. 192.

Of course the court can order a sale subject to subsequent encumbrances, provided such a sale realizes a sum sufficient to pay the prior lien. Coleman v. Witherspoon, 76 Ind. 285. And in Nebraska there has been some uncertainty as to the effect, in this respect, of their statutory appraisal of the property. See Hart v. Beardsley, 67 Nebr. 145.

The purchaser is not affected by a suit against the mortgagor, commenced after the mortgage was executed and to which the mortgagee was not a party. "He is privy in estate with the mortgagor only in respect to the estate as it existed when the mortgage was executed." Secor v. Singleton, 41 Fed. 725; Logan v. Stieff, 36 Fla. 473; Mathes v. Cover, 43 Iowa 512; Gamble v. Horr, 40 Mich. 561; Murphy v. Farewell, 9 Wis. 102.

As against intervening parties who are in a position to take advantage of non-record of the mortgage, the foregoing propositions must, of course, be modified to the extent of giving the foreclosure purchaser a title relating only to the date of recording the mortgage. And it is equally clear that the purchaser's title is subject to all rights which attached before the mortgage was executed, except as these may be postponed by the recording acts. See further, Chapter X, Priorities.

"His deed will relate back, it is true, to the beginning of his lien,

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CHRIST CHURCH v. MACK.

COURT OF APPEALS OF NEW YORK. 1883.
93 N. Y. 488.

This action was brought to restrain defendants from obstructing the light and air from the windows of plaintiff's church edifice, adjoining a lot owned by said defendant, Rhoda E. Mack. Plaintiff was formerly owner of said lot, which was subject to a mortgage given to one Bell. It conveyed the same to defendant John Mack, subject to the mortgage which the grantee assumed and agreed to pay. By the deed an easement was reserved of light and air to the grantor's church so long as its premises were used for church purposes. Mack conveyed to a third person, who, on the same day, conveyed to Rhoda E., wife of said John Mack. Her deed was made subject to the Bell mortgage, but contained no assumption of the same by her. The holder of the mortgage, at the request of defendants herein, foreclosed the mortgage by suit; plaintiff was made a party defendant therein. Judgment of foreclosure in the ordinary form was entered, and upon the sale under it Mrs. Mack became the purchaser and received the referee's deed. Mrs. Mack thereafter erected a fence upon her lot, which cut off the light from the basement windows of plaintiff's church.

FINCH, J.: It is conceded that a purchase under a foreclosure of the Bell mortgage would have given to a stranger to the title an ownership discharged of the plaintiff's easement. That the same result attends the purchase by Mrs. Mack, notwithstanding her relation to the property, follows from the reason upon which the conceded rule is founded. The statute provides that the deed given in pursuance of a sale on foreclosure shall vest in the purchaser "the same estate (and no other or greater) that would have vested in the mortgagee if the equity of redemption had been foreclosed," and further declares that such deeds shall be as valid as if executed by the mortgagor and mortgagee. The construction to be put upon these two provisions was early settled in this court. (Brainard v. Cooper, 10 N. Y. 358; Packer v. The Roch. & Syracuse R. R. Co., 17 *id.* 287.) In the last of these cases it was said that where legal title is concerned, a mortgage, which for many other purposes is a mere chose in action, is a conveyance of the land; that the interest remaining in the mortgagor is an equity, and that the foreclosure cuts off

in order to cut off intervening incumbrances, but it will not carry back the absolute divestiture of title, as is evident from the fact that neither judgment debtor nor mortgagor can be called to account for rents and profits. His title becomes absolute only when his right to a deed accrues." Lawrence, J., in Stephens v. Illinois Mut. Fire Ins. Co., 43 Ill. 327.

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and extinguishes that equity, and leaves the title conveyed by the mortgage. It was added that such was precisely the effect of a strict foreclosure, and that in construing the statute its two clauses were to be read in harmony. It was, therefore, decided that when the act says the master's deed "shall have the same validity as if executed by the mortgagor it is not to be taken that the purchaser is to be considered as holding under the mortgagor by title subsequent to the mortgage in a sense which would subject him to the effect of the mortgagor's acts intermediate the mortgage and the foreclosure." While it is clearly the modern doctrine that the mortgagee has by virtue of his mortgage no estate in or title to the land, or the right of possession before or after the mortgage debt becomes due (Ten Eyck v. Craig, 62 N. Y. 421), and only acquires such title by purchase upon the foreclosure sale, yet the character and extent of his title so acquired is described in the statute by a reference to the old rule and the old practice, when the mortgagor's right could be fitly termed an equity of redemption which could be foreclosed, leaving an absolute estate in the mortgagee. The effect of the foreclosure deed, therefore, as determined by the statute, is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage, and unaffected by the subsequent incumbrances and conveyances of the mortgagor. And thus, while the plaintiff corporation held title to the Mack lot, they held it subject to the Bell mortgage and to the absolute title into which that mortgage might ripen by a foreclosure and sale. When they sold to Mack, reserving an easement in the lot for light and air to their adjoining windows, they held their easement, and Mack held his ownership, still subject to the Bell mortgage and the absolute title into which it might be turned. Mack had assumed the payment of the Bell mortgage, but conveyed through a third person to his wife, subject to that mortgage, but without any liability for its payment assumed by her. Upon its foreclosure she became the purchaser and took the deed. That vested in her, under the statute provision, the title of the mortgagor and mortgagee unaffected by the intermediate acts of the mortgagor and those succeeding to his interest, unless there be something in her position which subjects her to a different rule.

The statute allowed her to be a purchaser, and in determining the effect of the foreclosure deed its terms draw no distinction among purchasers. It does not discriminate. Whoever may lawfully purchase becomes the purchaser whose title is described and determined, and we have no warrant in the facts to take Mrs. Mack out of the statutory protection.

The argument of the General Term, and of the learned counsel for the respondent on this appeal were both aimed at the result of converting her purchase into a mere payment and discharge of the

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mortgage lien, and her deed into a release of the incumbrance. The General Term reached the result by a disregard of the first clause of the statute declaring the effect of the deed, and what seems to us a misinterpretation of the second clause. In brief the reasoning was that the deed was to be equivalent to one made by the mortgagor and mortgagee; that the mortgagor had already conveyed, and his title, incumbered by an after constituted easement, had reached Mrs. Mack; that she could not be said to purchase what she already had; that so her deed was only equivalent to one made by the mortgagee, and he having no title, but merely a lien, the foreclosure deed operated only as a release to Mrs. Mack, however it might operate as to a stranger. We deem this reasoning defective in two respects. It construes the statute to transfer the mortgagor's title as it stood, not at the date of his mortgage, but burdened with its after incumbrances and limitations, imposed by him or his grantees; and it assumes what is not true, that Mrs. Mack already had the entire title of the mortgagor, and so could take nothing from him, but only the right of the mortgagee. The mortgagor had the absolute title incumbranced only by the mortgage. That title he transferred to the church, but when the latter conveyed to Mack it reserved an easement or servitude, and so parted with less than it received from the mortgagor. This title Mrs. Mack took and, therefore, did not get the entire interest which the mortgagor himself had. There was something which she had not got; which by a foreclosure of the Bell mortgage would pass; and which it was possible for her to purchase.

A further ground is stated which is based upon a theory that Mrs. Mack by virtue of her ownership of the lot came under some obligation to pay off the mortgage, and so could not in equity assert a title founded upon a breach of that obligation. Cases are cited in other States which hold that the mortgagor owes to his mortgagee the duty of paying taxes upon the land, and can not, by neglecting their payment and causing a sale and then becoming a purchaser, cut off the lien of the mortgagee. If the purchase had been made by Mr. Mack, who had assumed the payment of the mortgage, the question would have arisen. But Mrs. Mack owed no duty of payment either to the mortgagee or to the plaintiff. She assumed no such obligation. She violated no duty and incurred no personal liability by omitting to pay off the incumbrance. It was her right and privilege not to do so, and in the omission she did no wrong of which either party could lawfully complain. She had the right to leave the mortgagee to his remedy, and when he asserted it, the law allowed her to become the purchaser, and made no distinction between her rights and those of a stranger to the title.

It was urged that this view of the case left the plaintiff without any power to save its easement, since on the sale Mrs. Mack could safely outbid all others and beyond the mortgage debt. But the

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plaintiff should not have waited until the sale. When brought into court as a defendant, and certain to be bound by the decree, it should have sought to modify the decree, and showing the peril of its easement and offering to bid the full amount of the mortgage debt and costs upon a sale subject to the servitude, it should have asked that the sale be so made. The mortgagee could not object since his debt would be paid in full and he had no greater right; and Mrs. Mack could have asserted no equity to have the sale so made as to free her from the easement. But when no limitation or condition is imposed by the decree, and no duty of payment rests on the purchaser, the statute determines the estate which passes by the foreclosure deed.

The judgment of the General Term should be reversed and that of the Special Term affirmed, with costs.

All concur.

Judgment accordingly.[9]

EVANSVILLE GAS CO. v. THE STATE.

SUPREME COURT OF INDIANA. 1881.
73 Ind. 219.

[The State, by the auditor of Vanderburgh county as relator, prosecuted this suit against the appellant and Francis J. Reitz, and obtained judgment against the former, but not against the latter. The object of the action was to revive a decree of foreclosure upon two school-fund mortgages, which had been taken on May 12, 1862, against James G. Jones and wife. Said decree was rendered upon two several mortgages, one dated April 14, 1855, upon lot 23, block 171, in Lamasco City, and the other dated August 5, 1859, upon lot 29, block 129, both to secure the same sum. On the 3d day of November, 1865, said Jones and wife conveyed said lot 29 to the Evansville Gas. Co.]

ELLIOTT, J.: [After stating the facts.] The decree of foreclosure which this proceeding sought to revive was, as appears from the special finding, rendered on the 12th day of May, 1862, and this action was not instituted until the 10th day of November, 1877, more than sixteen years afterward. The appellant insists that the lien of the decree ceased at the expiration of ten years from the date of its rendition. The argument is that the mortgage was merged in the

[9] Compare, Van Horne v. Everson, 13 Barb. (N. Y.) 526; Huxley v. Rice, 40 Mich. 73; Thompson v. Heywood, 129 Mass. 401; Manwarring v. Powell, 40 Mich. 371 (cf. Canfield v. Shear, 49 Mich. 313); Kennedy v. Borie, 166 Pa. St. 360; Carlisle v. Libby, 185 Mass. 445; Brown v. Winter, 14 Cal. 31; Russell v. Heirs of Mullanphy, 4 Mo. 319.

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judgment, and that, as the statute limits the lien of a judgment to a period of ten years from its date, with the expiration of that period terminated the lien of the decrees sought to be revived.

Appellant's chief reliance is upon section 527 of the code, which provides, *inter alia*, that all final judgments for the recovery of money or costs shall be a lien upon real estate for ten years after the rendition thereof, and no longer. 2 R. S. 1876, p. 233. The statute in terms applies only to judgments for the recovery of money, and does not apply to a decree of foreclosure establishing a specific mortgage lien upon real estate, and we do not think it should, by construction, be so extended as to apply to such decrees of foreclosure. Section 642 of the code is also relied upon by the appellant. If the appellant is correct in asserting that the judgment merges both the lien of the mortgage and the cause of action evidenced by it, and that the lien of the judgment takes the place of that of the mortgage, then, under the provisions of either statute, it is entitled to a reversal.

If the decree of foreclosure, which the State obtained against Jones and wife, is to be treated as an ordinary judgment, then it must be held that the lien was lost long before this action was instituted. The controlling question, therefore, is, whether a decree of foreclosure is to be treated as an ordinary judgment; for, if it is to be so regarded, then the appellant is clearly right.

If the judgment merged the mortgage lien, then the mortgage lien was extinguished. It will not do to assume, as a matter of course, that there was a merger, for there are many cases in which, in order to prevent injustice, courts will not allow merger to take place, although all the essential elements of a technical merger combine in the particular case. Mergers are not favored. As Chief Justice Parker tersely said, in Gibson v. Crehore, 3 Pick. 475, "Mergers are odious in equity."

Nor is it clear that, where a mortgage is foreclosed, the decree "swallows" the lien of the mortgage. There are at least two very strong reasons why this can not on principle be so: First, the mortgage lien is a specific one, the judgment a general one, and the lien of the former is, therefore, the superior one. The difference between mortgage and judgment liens is clearly drawn by Worden, J., in Gimbel v. Stolte, 59 Ind. 446. Second, the lien of the mortgage is superior in duration to that of the judgment. In these two essential particulars, the mortgage lien is the greater, and it would seem almost a contradiction of terms to declare that the inferior lien can swallow the greater. The whole theory of merger is that the greater estate or thing takes into itself the less, and this can not be so where there are essential particulars in which the one alleged to be the inferior is really the superior. It can hardly be possible that even an imaginary legal entity can be conceived as capable of ab-

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sorbing into itself another thing greatly larger in two very essential and prominent features.

The merger of a judgment takes up the mortgage as a cause of action, but not as a lien. There is a broad distinction between a merger of a cause of action and the merger of a lien, It is owing to error in confusing the merger of the cause of action with the merger of a lien, that some of the courts have been led into the erroneous holding, that a judgment extinguishes the mortgage lien.

A suit of foreclosure is a remedy for the enforcement of a mortgage lien, and it ought not to be abridged by holding that the decree cuts down, rather than enlarges, the lien. Without a decree the lien continues for twenty years, and surely that which is meant to carry into effect this lien ought not to be allowed to have the effect of shortening the duration of the lien to a period one-half shorter than that for which it would continue without the decree. Upon principle it is, in our opinion, very clear, that although the judgment merges the mortgage as a cause of action, it does not abridge or extinguish its lien.

Although there is some conflict in the authorities, we think the weight is with the doctrine, that the decree of foreclosure does not merge the lien of the mortgage. Counsel cite us to Freeman on Judgments, sections 215 and 216, but we think these sections afford appellant's theory no support. The author is speaking of the effect of a judgment upon the mortgage as a cause of action, not of its effect upon the lien created by the mortgage. There can not well be two opinions upon the proposition, that the mortgage as a cause of action is merged in the decree, and that all rights growing out of it as a right of action are merged in the judgment or decree. This, however, is not the point here in debate. In The People v. Beebe, 1 Barb. 379, it was held that the lien of the mortgage was merged in the decree, and this doctrine is stated approvingly in Gage v. Brewster, 31 N. Y. 218. These are the only cases to which appellant has referred, and we have found no others supporting the doctrine they declare.

There are many well-considered cases holding a doctrine different from that declared by those upon which appellant relies. In our own reports, we have the case of Lapping v. Duffy, 47 Ind. 51, where it was held that a judgment did not extinguish the lien of the mortgage. It is true that the case just cited did not pass upon the question as here presented, but the principle enunciated is substantially the same as that which must govern the case under examination. We have also the case of Teal v. Hinchman, 69 Ind. 379, where the same general doctrine is declared and enforced. In the case of Helmbold v. Man, 4 Whart. (Pa.) 409, the question was considered and decided adversely to the doctrine of the New York cases. It was there said: "The lien was created by the mortgage itself; the judg-

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ment neither added to, nor took anything from it; and it is clear, therefore, that the acts of Assembly, which require judgments creating liens or binding lands or real estate, to be revived every period of five years, for the purpose of continuing such liens, do not extend to or embrace the liens of mortgages, and can have no application to or bearing upon them whatever."

The rule, that the mortgage lien is not merged in the decree, is asserted by the Supreme Court of Iowa in two well-considered cases: Stahl v. Roost, 34 Iowa, 475; Hendershott v. Ping, 24 Iowa, 134. The same rule has long since been the settled law of Missouri. Riley's Adm'r v. McCord's Adm'r, 21 Mo. 285. Illinois has adopted and enforced a like doctrine. Priest v. Wheelock, 58 Ill. 114.

The rule, that the lien of the mortgage is not absorbed by the decree or judgment, is in harmony with settled general rules, while the opposite doctrine is in direct conflict with them. It is a rule of very frequent application, and upon which there is no contrariety of judicial opinion, that a mortgage lien is only extinguished by payment or release, and, with this rule, the doctrine that the decree does not merge the lien of the mortgage fully harmonizes; while the opposite rule is in direct and irreconcilable hostility to it. We have already adverted to the well known rule, that, as the lien of the mortgage is specific, while that of the judgment is general, the former is the superior. The doctrine, for which the appellant contends, that the lien of the judgment supplants that of the mortgage, can not be brought into harmony with the general rule just stated. There is a sharp and full conflict, but we deem it unnecessary to multiply illustrations. It is obvious that appellant's theory jars and conflicts with many settled principles; while the opposite theory agrees and harmonizes with all the great rules of law, except the technical one of merger, a doctrine neither important in its practical results, nor well supported by either reason or authority.

* * * * * * * *

Judgment affirmed.[10]

[10] "The mortgage-deed, though in some senses merged in the decree, remains a muniment of the title which passed to the purchaser at the mortgage sale, and to be looked to, not only for the purpose of ascertaining the point of time at which the mortgage lien attached, but also (in the absence of express directions in the decree limiting the estate to be sold) the estate purporting thereby to have been conveyed by way of mortgage, as being in fee or otherwise." Wallace, C. J., in Vallejo Land Assn. v. Viera, 48 Cal. 572, holding that covenants of title implied by statute in a mortgage in fee enure to the benefit of the purchaser at foreclosure, passing a title acquired by the mortgagor after the execution of the mortgage.

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OGLE v. KOERNER.

SUPREME COURT OF ILLINOIS. 1892.
140 Ill. 170.

On the 6th day of February, 1890, Gustavus A. Koerner and Timothy McCarthy filed their bill in chancery, in the Circuit Court of St. Clair county, alleging, in substance that, on the 13th day of October, 1886, Russell Hinckley was indebted to Benjamin Higgins, in the sum of $21,700; to Benjamin Smith in the sum of $12,728, and to Joseph Ogle in the sum of $20,000, and that being so indebted, he executed to each of his said creditors his two certain promissory notes, due in one and two years after date, for the amounts of his indebtedness to them respectively; that he was also indebted to Henry M. Needles, administrator *de bonis non* of the estate of John Short, deceased, in the sum of $10,000, and that on the same day he executed his promissory note for that amount, due two years after date; that to secure said notes to Ogle, Smith and Higgins, said Hinckley and wife, on the same day, executed and delivered to said Koerner, as trustee, their five deeds of trust on lands in the counties of St. Clair, Marion, Clinton, Fayette and Wayne, the trust deed on lands in St. Clair county conveying certain lands in said bill particularly described; that also on said day, said Hinckley and wife, to secure said note to Needles, executed and delivered to Koerner, as trustee, five similar deeds of trust, on the same lands, the deeds of trust in favor of Needles being made second and subject to the lien of those in favor of Ogle, Smith and Higgins.

The bill further alleges, that, at the February term, 1888, of the Circuit Court of St. Clair county, said Koerner exhibited his bill in chancery to foreclose the deeds of trust given to secure the indebtedness to Ogle, Smith and Higgins, and that said Needles, as junior mortgagee, was made a party defendant to said bill; that such proceedings were had in said foreclosure suit, that a decree was entered finding the facts as to the indebtedness to Ogle, Smith and Higgins, and to Needles, and as to the execution of said several deeds of trust, as above stated, and also finding the amount due to said several creditors, the amount found due on the Needles note and trust deed being $5,704.74; that said decree also found that, in June, 1887, said Hinckley and wife conveyed all of said lands, subject to the deeds of trust, to Willer H. Horner; also that Needles had assigned his note to certain parties, who, as the bill alleges, afterwards, and on the 6th day of August, 1889, assigned and transferred the same, with all their rights, claims, interest and equity of redemption thereunder to McCarthy, one of the present complainants.

It was further alleged that said decree ordered and adjudged that

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said deeds of trust be foreclosed and the lands thereby conveyed sold by the master in chancery, and that the proceeds, after paying costs and expenses, be applied to the payment of the indebtedness to Ogle, Smith and Higgins, and that the surplus, if any, should be applied to the indebtedness secured by said junior deeds of trust, and that the holders of said junior deeds of trust have twelve months from the date of sale within which to redeem.

That in pursuance of said decree, said master sold said lands on the 17th and 18th days of September, 1888, and that at said sale, Andrew A. Miller bid off and purchased certain lands in St. Clair county, containing in all about 488 acres, for the sum of $2,685, and received the master's certificate of sale therefor; that on the 26th day of August, 1889, said McCarthy, being the assignee of said junior deeds of trust, and of the promissory note thereby secured, redeemed said 488 acres of land from said sale to Miller, by paying to said master the sum of $2,894.82, being the amount of Miller's bid with interest at the rate of eight per cent. per annum from the date of sale, and that said master executed to said McCarthy a certificate of redemption therefor.

The bill further shows that the sum of $5,714.74, found by said decree to be due on the Needles note, with interest thereon from the date of the decree, is still due and payable to said McCarthy, and that by reason of said redemption, said sum of $2,894.82 and interest, as well as the amount due on said note and deed of trust, are subsisting and valid liens upon said 488 acres of land; that Hinckley has conveyed his equity of redemption in all of said lands to Horner and is insolvent; that all of the lands conveyed by said deeds of trust have been sold under said decree, the largest part in value having been bid in by Ogle, Smith and Higgins, but that sufficient was not realized therefrom to satisfy the first deeds of trust.

Said bill prayed that an account be taken of the amounts due said McCarthy, and that defendants Ogle, Smith, Higgins and Horner, or some of them, be decreed to pay said McCarthy the amount found due him, with costs and attorney's fees, by a short day to be appointed by the court, and that in default of such payment, said defendants, and all persons claiming by, through or under them, be forever barred and foreclosed of all right and equity of redemption in or to said mortgaged premises or any part thereof.

Defendants Ogle, Smith and Higgins appeared and answered, and filed their cross-bill, in which, after alleging the indebtedness from Hinckley to them, the execution of Hinckley's promissory notes therefor and the execution by Hinckley and wife of the trust deeds securing the same; also the subsequent execution by Hinckley and wife of the deeds of trust to secure said note of $10,000 to Needles; also the foreclosure proceedings and decree and the sale thereunder; the assignment of the Needles note and deed of trust, through cer-

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tain third parties, to McCarthy; the conveyance of all of said lands by Hinckley and wife to Horner; the payment by McCarthy to the master in chancery of $2,894.82 in redemption of the 488 acres of land bid off by Miller and the execution by the master to McCarthy of said certificate of redemption, substantially as alleged in the original bill, they allege that, immediately after the execution of said certificate of redemption, McCarthy took possession of the lands so redeemed and has ever since had possession thereof, claiming the same by virtue of said proceedings; that the land so redeemed is worth at least $17,000, and that 200 acres of it are under cultivation and are of the annual rental value of $4 per acre, and that McCarthy is collecting the rents therefrom amounting to at least $800 annually; that the proceeds of the master's sale were not sufficient to pay the complainants in the cross-bill their respective claims, but that there is now due them the sum of $5,000 which is a first lien on said 488 acres of land, subject, however, to the redemption money paid by McCarthy, less the amount received by him from rents and profits while in possession of said lands; that said Hinckley is insolvent, so that the complainants have no means of collecting from him the balance due them on said foreclosure decree; that they tender the amount of the redemption money paid as aforesaid, less the amount of said rents and profits, to said McCarthy.

Said cross-bill prays that an account be taken of the amount due McCarthy for the redemption money paid, deducting the amount received by him for rents and profits; that said 488 acres of land be sold by the master, and that out of the proceeds, after paying the costs of suit and the expenses of sale, the amount found due McCarthy for redemption money be first paid; next the balance due the complainants in the cross-bill, and next the amount found due McCarthy on the claim assigned to him, and that the residue, if any, be brought into court to await the further order thereof.

To said cross-bill McCarthy demurred for want of equity. which demurrer was sustained by the court, and thereupon a decree was entered dismissing the cross-bill at the costs of the complainants therein. McCarthy and Koerner thereupon asked leave to dismiss their original bill, which leave was granted, and said bill was dismissed on their motion.

Said decree being taken to the Appellate Court, Ogle, Smith and Higgins assigned for error the sustaining of the demurrer to the cross-bill and the dismissing of said bill at their costs, and also the dismissing of the original bill without the consent of the complainants in the cross-bill. The Appellate Court overruled said assignments of error and affirmed the decree, and the record is now brought to this court on appeal from said judgment of affirmance.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

If it be assumed that the cross-bill in this case was properly dis-

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missed, the court committed no error in allowing the complainants in the original bill to dismiss their bill on their own motion and at their own costs. It is true the statute provides that no complainant shall be allowed to dismiss his bill after a cross-bill has been filed, without the consent of the defendant, but after a final decree dismissing the cross-bill the case, so far as the original bill is concerned, stands precisely as though no cross-bill had been filed. The complainants are then at liberty to dismiss their bill, and it would be error for the court to deny their motion to dismiss. Reilly v. Reilly, 139 Ill. 180. It may be, if this court should be of the opinion that the cross-bill in this case was improperly dismissed, and should reverse the decree in that respect, so as to reinstate the cross-bill, that the complainants in that bill would have a right to insist upon the vacation of the order dismissing the original bill, so as to restore the case upon both bills to the position in which it stood before the commission of the error. But until it is found that the cross-bill is improperly dismissed, the order dismissing the original bill can not be disturbed.

The only substantial question presented by the assignment of errors then is, as to the propriety of the decision of the court sustaining the demurrer to the cross-bill. The theory of that bill seems to be, that the redemption by McCarthy, the assignee of the junior mortgage, of the 488 acres of land in question from the sale under the decree foreclosing the senior mortgage, had the effect, not only of cancelling the sale, but of wiping out all its legal consequences, so as to subject said land again to the lien of the senior mortgage, and thus enable the holders of that mortgage to satisfy the unpaid balance of their incumbrance in preference to the junior mortgage.

In support of their contention, the complainants in the cross-bill seek to invoke those principles which apply to equitable redemptions, and which require the party seeking to redeem to pay the entire incumbrance from which redemption is sought. Doubtless if McCarthy were in a court of equity praying to be permitted to redeem from a prior incumbrance, relief would be granted him only upon payment of the entire incumbrance. Thus, if neither he nor any person to whom he sustains the relation of privity had been made a party to the foreclosure suit, and he, after the statutory period of redemption from the foreclosure sale had expired, had filed his bill to redeem, he would have been required to redeem from the mortgage and not merely from the sale. He would in that case have been required to pay not merely the amount bid for the land and interest but the balance which the sale left unsatisfied.

That the principles applicable to equitable redemptions do not apply is obvious from a variety of reasons. In the first place, McCarthy, so far as his relation to the cross-bill is concerned at least, is not a suitor in a court of equity asking relief of any kind, but is

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only a defendant seeking to contest the equities attempted to be enforced by the complainants in that bill. Again, McCarthy is not asking to be allowed to redeem, even by the original bill. The redemption is a fact already accomplished, and he is only seeking to enforce equities to which he became entitled by having redeemed. Thirdly, McCarthy's redemption of said land not only professed to be but in fact was a statutory redemption from the foreclosure sale, and entitled him to all those rights, both legal and equitable, which the statute gives in case of such redemption.

In all cases of sales of land under foreclosure decrees, the statute gives to any defendant, his heirs, administrators or assigns, or any person interested in the premises through or under the defendant, the right to redeem the land sold, at any time within twelve months from the date of the sale, by paying the purchaser or the master the sum of money for which the land was bid off, and interest thereon from the date of sale at the rate of eight per cent. per annum. R. S. 1874, chap. 77, sec. 18. Needles, the junior mortgagee, was made a defendant to the foreclosure suit, and McCarthy afterwards became interested in the mortgaged premises under Needles, by assignment to him of the junior mortgage and the indebtedness thereby secured. He therefore was a party who, under the statute, was entitled to redeem from the sale, and the admission of the cross-bill is that he did so redeem, by paying to the master the sum for which the land in question was sold with interest. The redemption therefore was unquestionably statutory, and whatever may be the rules applicable to equitable redemptions, the only question here is, as to the rights, as against the senior mortgagee, which a junior mortgagee acquires by a statutory redemption from a sale under the senior mortgage.[11]

[11] In about a third of the states the statutes provide for redemption from a sale under a decree foreclosing a mortgage. These statutes vary widely in their provisions, e. g., as to who may redeem, when he may redeem, what sum he must pay to redeem, to whom, when and where he must pay it, what the effect of the redemption is upon the rights of the several parties, &c; nor are the decisions construing these statutes entirely harmonious; but a few general principles regarding them are fairly fixed.

In Eiceman v. Finch, 79 Ind. 511, Elliott, C. J., says, "There are two rights of redemption; the general equitable right and the statutory right. The former is forever barred by the decree and sale; the latter does not spring into existence until the sale takes place. This statutory right comes into existence with the sale; it continues for one year and then expires."

In Spurgin v. Adamson, 62 Iowa 661, Beck, J., says, "It is insisted that the only right of redemption was that conferred by the statute, and that, as the time within which that right may be exercised under the statute had expired before this suit was brought, he is not entitled to redeem from the mortgage. It can not be doubted that he lost the statutory right to redeem and we do not understand that he claimed it.

"But the plaintiff, as the holder of a lien upon the property, has, in equity, a right to redeem until that right is cut off by foreclosure. As

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A mortgage, or as in this case, a deed of trust in the nature of a mortgage, vests in the party secured a lien upon the mortgaged premises. By virtue of that lien the mortgagee is entitled to have the mortgaged property sold under a decree of foreclosure and the proceeds of the sale applied to the payment of the debt secured. This is the mode provided by law for the enforcement of the lien, and when the lien has been once enforced by the sale of the property, it has, as to such property, expended its force and accomplished its purpose, and the property is no longer subject to it.[12]

When the redemption is made by a party primarily liable on the mortgage debt, it may be that the same property may be resorted to again for the purpose of subjecting it to the payment of an unpaid balance due on the mortgage, but that is not because of any right to enforce the mortgage lien against the same property a second time, but because of the rule of law which subjects all the property of a debtor to the payment of his debts until they are satisfied in full. But where the redemption is made by a party not liable upon the mortgage debt, the mortgage lien having been exhausted, the property can not be subjected a second time to the satisfaction of the same lien. The party redeeming does so for his own benefit, and the holders of the senior mortgage having, by the sale, become entire strangers to the property, are in no position to derive any advantage

this was not done, and he was not made a party to the action to foreclose, he retains this equitable right. Defendants insist that this equitable right of redemption is merged in the statutory right, and limited, as to the time of its exercise, by the provisions of the statute. There is nothing to be found in the statute taking away the equity of redemption and substituting therefor the statutory redemption. Code, sec. 3321, provides that sales of land under foreclosures of mortgages are subject to redemption as in cases of sales upon general executions. Under this statute, an incumbrancer, or one holding an interest in the land, which, under the statute, would give him the right to redeem, may exercise that right within the time prescribed by the statute, although he was a party to the foreclosure action, and his equity of redemption was cut off by the decree of foreclosure. The equity of redemption ceases to exist after the expiration of the time fixed by the decree of foreclosure, or the rules of chancery applicable thereto. The statute, under our view, confers a right upon the junior incumbrancer not given by chancery. By its terms it does not limit the right of redemption before existing under the rules of equity. That right is, therefore, not taken away by it. It was not the purpose of the statute, in conferring this right of redemption, to take away another and different right recognized by equity."

12 Compare Lightcap v. Bradley, 186 Ill. 510.

When a mortgage is foreclosed for an installment of the debt, it is usually held that the mortgage lien is completely discharged, unless the sale is expressly subject to the lien of the mortgage for the balance. Harms v. Palmer, 73 Iowa 446; Fowler v. Johnson, 26 Minn. 338; McLean v. Hoehle, 98 Wis. 359; Curtis v. Cutler, 76 Fed. 16. But see Edgar v. Beck, 96 Mich. 419, as to statutory foreclosure in Michigan. And see 37 L. R. A. 737, note.

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from the redemption. The sale having been made at public auction, and in the manner prescribed by the statute, the presumption, as between the senior and junior incumbrancers, is a conclusive one, that the property has produced its entire value, and that value having been once applied to the senior mortgage, the lien has accomplished its full purpose and is thereafter *functus officio*.

It is idle for the senior mortgagee to urge that the property redeemed is in fact worth much more than the price for which it was sold at the foreclosure sale. He was a competent bidder at such sale, and therefore had it in his power to bid the property up to its fair cash value, and if he failed to do so, a presumption arises from which he can not escape, that the property sold for what it was reasonably worth. At any rate, the mortgagee under whose decree the mortgaged property is sold, in the absence of all irregularity and unfairness in the sale, must be conclusively held to the price bid, as a full equivalent for and satisfaction of his lien, and having received the proceeds of the sale, he becomes a mere stranger to the property.

It follows from what we have said, that McCarthy redeemed the land in question free from the lien of the senior deed of trust. By the redemption, the sale and certificate, as the statute declares, became null and void, but upon familiar principles of equity, McCarthy became subrogated to the rights of the purchaser to the extent of having a first lien on the land redeemed for reimbursement of the redemption money. The prior deed of trust being out of the way, the junior deed of trust became subject only to McCarthy's lien for the redemption money.

The view we have taken is supported by the case of Seligman v. Laubheimer, 58 Ill. 124. In that case the land in controversy was subject to a senior and a junior mortgage, and a decree of foreclosure was rendered finding the amounts due on both mortgages, and declaring one to be a first and the other a second lien. Under the decree the land was sold for a sum less than sufficient to pay the amount of the first mortgage. Before the expiration of twelve months from the sale, the junior mortgagee redeemed. On application of the senior mortgagee to have the balance due him ascertained and declared to be a still subsisting lien on the mortgaged property and for a resale of the property, it was held that the lien of the first mortgage was extinguished, and that the junior mortgagee redeeming under the statute, took the land free from the lien of the first mortgage. The following was a portion of the reasoning upon which the decision was based:

"What was the effect of the redemption? The second mortgagee, who redeemed from the sale, was the grantee of the mortgagors. By the express provision of the statute, he had the right to redeem the lands, by the payment of the amount bid by the plaintiff in error. If he had filed a bill in chancery to redeem, he would then be com-

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pelled to do equity, by the payment of the prior mortgage debt, before he could obtain relief. But this redemption was a statutory right. Upon the payment of the amount bid, with interest, the original certificate of purchase was null and void. The equity of redemption established by the courts, is entirely different from the statutory right. The one is governed by the principles of equity jurisprudence; the other is controlled, in its operation and effect, entirely by the statute. In the enforcement of the one right, the party must pay all that is equitably due; in the other he need only comply with the statute."

Some decisions are cited from other states in relation to redemptions from foreclosure sales, but the statutes of the states where those decisions were made were essentially different from ours, and the cases cited are therefore of little weight as authority here. We are of the opinion that the rule laid down in Seligman v. Laubheimer, *supra,* is entirely sound, and that it must control in the present case.

No other question is presented which is not substantially disposed of by what has already been said. The cross-bill showed no equity, and the demurrer thereto was properly sustained.

The judgment of the Appellate Court affirming the decree of the Circuit Court will be affirmed.

Judgment affirmed.

LORD, C. J., in WILLIS *v.* MILLER, 23 Ore. 352. (1893)

The principal question to be determined is, whether the land redeemed by the plaintiff as the grantee of Phipps is subject to resale for the payment of an unsatisfied portion of the decree or judgment for deficiency rendered against Phipps? The contention for the plaintiff is, that when the land owned by him was sold by the sheriff to the mortgagee under the decree foreclosing the mortgage upon it and other lands, and the sale of the same was confirmed by the court, the lien of the mortgage was extinguished, and if there remained any portion of the decree unsatisfied by reason of such lands not selling for a sufficient sum to pay the whole of it, the judgment for such deficiency, when docketed, became, by force of general law, a lien upon any lands owned then or thereafter by the judgment debtor Phipps, but not against any land plaintiff had purchased of Phipps anterior thereto; and, consequently, that when he redeemed the land so owned by him by payment of the sum required therefor, for the benefit of the purchaser or mortgagee, the effect was to terminate the sale, and to restore him to his estate, freed from the mortgage lien and decree for the unpaid balance. On the other hand, the contention for the defendant is, that when the land of the plaintiff was sold under the decree of foreclosure and sale, with other lands covered by the mortgage, and the sum realized from such sale was

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less than the amount found to be due on the mortgage, and plaintiff redeemed the land from the sale, the mortgage and decree continued as a lien on his land for the unpaid balance.

Our Code provides for the foreclosure of a lien of a mortgage by a suit in equity in which the property subject to the mortgage lien shall be adjudged "to be sold to satisfy the debt secured thereby;" and in such suit, in addition to the decree of foreclosure and sale, where there is a promissory note or other personal obligation for the payment of the debt, "the court shall also decree a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary decree for the recovery of money": Hill's Code, § 414. And it further provides, that when a decree of foreclosure and sale is given, it may be enforced by an execution "against the property adjudged to be sold," but that when the decree is also in personam, and "the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree as to the sum remaining unsatisfied, the decree may be enforced by execution as in ordinary cases": Hill's Code, § 413. The decree has the effect to bar the equity of redemption, but the property sold thereon "may be redeemed in like manner and with like effect" as property sold upon a judgment, "and not otherwise": Hill's Code, § 414. By sections 303 and 304, it is provided that the judgment debtor, or his successor in interest, may redeem at any time prior to the confirmation of sale, on certain terms therein specified, and also under confirmation of sale, but "if the judgment debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminatd, and he shall be restored to his estate."

* * * * * * * *

I do not think that the decree of foreclosure and sale merges or extinguishes the lien of the mortgage. The mortgage lien is a specific one, and the judgment obtained is a general one. The suit of foreclosure is a remedy for the enforcement of the lien, and certainly is not intended to have the effect to impair or abridge the mortgage lien. That effect can only be accomplished by payment of the mortgage debt or a release. The lien was created by the mortgage, and the decree neither added to nor took anything from it, and the effect of the sale under it was vacated or terminated by the redemption, and thereafter the mortgage and judgment of foreclosure stood as though no sale had ever been made. In Goddard v. Renner, 57 Ind. 536, the court says: "When the real property is redeemed from a sale under execution, either by the owner or some one else acting in his behalf, the certificate of sale is simply annulled, and the property restored to the position it occupied before the sale, with the judgment lien or liens reinstated for any balance or balances remaining unpaid, and may be resold to discharge such judgment lien or liens."

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See also Teal v. Hinchman, 69 Ind. 385. The object of the sale is to cut off the equity of redemption and the rights of all subsequent incumbrancers. As to such the sale may extinguish their liens, since they are bound to protect themselves, when parties to the decree, by bidding on the property, as Lauriat v. Stratton, 11 Fed. Rep. 114, illustrates and declares.

The foreclosure and sale is intended to cut off all subsequent incumbrancers that are made parties, so that to protect themselves they must bid on the property or suffer the consequences of the extinguishment of their liens, as the object of the sale is to dispose of the property to the highest bidder; and this consequence to the later incumbrancer is calculated to promote a healthy competition and make the property bring its full value. But the decree of foreclosure and sale does not supersede the mortgage and extinguish the lien for any unpaid balance, when the property is redeemed by the judgment debtor or his successor in interest, for in that case the effect of the redemption is to vacate the sale, or so far as the property is concerned, it stands as though no sale had ever been made.

The view expressed by Mr. Austin Abbott is in point upon this subject. He says: "Our law requires that the mortgagee should apply to a court of equity, not for the purpose of cutting off the mortgage and selling the land under the judgment as land is sold under execution, but for the purpose of establishing the mortgage, and cutting off the equity of redemption and the rights of all intermediate claimants. The decree of foreclosure does not supersede the mortgage. The mortgage remains upon the record, and is the foundation of the decree, and it is the title which was pledged by the mortgage, thus freed from subsequent incumbrances, which the court sells. Foreclosure starts with the mortgage, and trims off all later excrescences. To regard it as an execution sale, intended to prune off the mortgage, is to reverse the legal fact and imagine the less can include the greater. The legal fact involved in a decree of foreclosure, so far as the title to the land is concerned, is that the court lays hold of the title which was in the mortgagor at the time of the mortgage, and which was expressed to be conveyed thereby, cuts off all later incumbrancers that are made parties, and transfers the disincumbered right and title to the highest bidder. The decree merges the cause of action for foreclosure, * * * but it does not merge the title to the land in the foreclosure case": Evansville Gas Light Co. v. State, 73 Ind. 219 (38 Am. Rep. 133, note). As bearing upon this point, the following authorities may be consulted: Note in 20 Am. L. Reg. 683; Anderson v. Anderson, 129 Ind. 574 (28 Am. St. Rep. 211; 29 N. E. Rep. 35); Pence v. Armstrong, 95 Ind. 207; Settlemeir v. Newsome, 10 Or. 446; Freeman, Judgments, § 398.

It may be admitted that the case presents some harsh features, but in my view of the law, I do not see how the plaintiff can be re-

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lieved. But as the majority of this court has reached a different conclusion, the decree must be reversed.[13]

TIFFANY, REAL PROPERTY, § 558. As previously stated, the mortgage is usually given to secure a debt for which the mortgagor is personally liable, and the enforcement of this liability becomes a matter of importance in case the amount of the debt can not be realized from the mortgaged property. It has always been considered, in the absence of a statutory provision to the contrary, that the mortgagee may enforce his different rights at the same time, pursuing concurrently his suit in equity to foreclose and his action at law on the note or bond evidencing the mortgagor's personal liability. Likewise, recovery in an action on the debt does not affect the right to subsequently foreclose; nor does the completion of foreclosure prevent a subsequent suit to recover on the personal liability, unless the result of the foreclosure is to satisfy the debt.

Formerly, in case the proceeds of the sale of the property were insufficient to pay the obligation, the only mode in which the mortgagee could enforce the mortgagor's personal liability was by a separate action at law against the mortgagor. Of recent years, however, statutes have been passed in many states authorizing the entry in the foreclosure proceeding of a personal judgment or decree for the deficiency against the mortgagor or other person liable for the debt; and in such states the mortgagee is usually subject to restrictions of a more or less positive character upon his right to institute separate proceedings to enforce the personal liability and to foreclose.

[13] Compare, Hervey v. Krost, 116 Ind. 268; Anderson v. Anderson, 129 Ind. 573; Warford v. Sullivan, 147 Ind. 14; Clayton v. Ellis, 50 Iowa 590; People's Savings Bank v. McCarthy, 119 Iowa 586; Cooper v. Maurer, 122 Iowa 321; Clark v. Butts, 78 Minn. 373.

Where the statutes allow redemption after a foreclosure sale, they usually provide that the purchaser shall not receive a deed until the period of redemption has expired. He receives, at the time of the sale, a certificate of sale which gives him a lien on the property for the purchase money and a right to have a deed if no redemption is made.

Whether one who redeems from a foreclosure sale acquires the rights of the purchaser, with the right ultimately to have a sheriff's deed, or merely discharges the encumbrance created in the hands of the purchaser by the sale; and whether, if the latter be the case, the redemptioner has a lien for the money advanced to make the redemption; and whether, after a redemption by one of several persons entitled to redeem, another has a right to redeem from the redemptioner, and, if so, upon what terms such re-redemption may be made—these and many other difficult questions arise under the redemption statutes. Their solution depends, of course, upon the terms of the statutes, which are diverse, and the construction thereof, which is not entirely harmonious. See cases cited above, and Johnson v. Johnson, Walker Ch. (Mich.) 331; Moore v. Smith, 95 Mich. 71; McGregor v. Pierce, 17 S. Dak. 51. It will be found that in solving these questions distinctions are necessary between redemptions by the different classes of persons who are entitled to redeem.

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MALLIN v. WENHAM.

SUPREME COURT OF ILLINOIS, 1904.
209 Ill. 252.

[Mallin, to secure an indebtedness to Wenham, assigned to the latter all wages to be earned by him in the future. Thereafter, Mallin filed a petition in bankruptcy, under the Act of 1898, his indebtedness to Wenham being scheduled and Wenham having notice thereof, and subsequently obtained a discharge in bankruptcy. Thereafter Wenham brought suit in the name of Mallin for the use of Wenham, against Armour & Co., claiming the wages of Mallin by virtue of the assignment. Mallin thereupon filed a bill in equity against Wenham and Armour & Co., to restrain the prosecution of the suit. From a judgment of the Appellate Court in favor of Wenham the complainant appeals.]

RICKS, J. [After deciding that the assignment created an equitable lien upon the wages which had accrued.] It is next insisted by appellant that because of bankruptcy proceedings had by him the assignment is unenforceable. This position, we think, is wrong. The only effect of a discharge in bankruptcy is to suspend the right of action for a debt against the debtor personally. It does not annul the original debt or liability of the debtor. In Bush v. Stanley, 122 Ill. 406, the court said (p. 416): "The discharge is analogous, in effect, to the Statute of Limitations, in so far as it does not annul the original debt, but merely suspends the right of action for its recovery." In Pease v. Ritchie, 132 Ill. 638, this court further said (p. 646): "It is no doubt true that appellant's discharge in bankruptcy operated as a bar to any action which might be brought to recover any debt or obligation existing at the time he was declared a bankrupt, and after acquired property was exempted from being taken in satisfaction of any such debts. But if any creditor had a lien or an equitable claim, by mortgage or otherwise, upon any property of the bankrupt, such right or rights would remain unaffected by the proceedings in bankruptcy."

In the case of Edwards v. Peterson, (80 Me. 367), an employee had given an assignment of his wages. Subsequently he filed a petition for discharge under the insolvent law of the State, and in its opinion the court there said: "The rule laid down by Judge Story in Mitchell v. Winslow, 2 Story, 630, seems to have been very generally held by all chancery courts in this country. He says: 'It seems to me a clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto

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under him, either voluntarily or with notice in bankruptcy.'" The language above quoted is also quoted with approval in the case of Gregg v. Sanford, 24 Ill. 17.

In the case of Champion v. Buckingham, 42 N. E. Rep. 498, it was held that a creditor who has not proved his debt in bankruptcy is still, after discharge of the debtor, a subsisting creditor against him to the extent of his debt, which he is entitled to have paid out of the proceeds of a policy of insurance on the life of the debtor assigned to him by the debtor and beneficiary to secure subsisting demands in favor of the creditor, and it was said that the discharge did not extinguish the debt or demand, but that the effect of such discharge is analogous to that of the bar of the Statute of Limitations, which only goes to bar a creditor's remedy and does not wipe out the debt.

In discussing the right of a creditor to maintain an action on a collateral agreement as security after the debt so secured has become barred by the Statute of Limitations, it was said in Shaw v. Silloway, 14 N. E. Rep. 783: "If there is an actual pledge and the debt becomes barred, this does not give to the debtor a right to re-claim his pledged property. The debt is not extinguished—the statute only takes away the remedy. (Hancock v. Insurance Co., 114 Mass. 156.) In case of a mortgage of real or personal estate the security is not lost though the debt be barred. (Thayer v. Mann, 19 Pick. 535.) The rule is the same where there is a lien. (Spears v. Hartly, 3 Esp. 81; Higgins v. Scott, 2 Barn. & Adol. 413; In re Bromhead, 16 L. J. Q. B. 355.) And there appears to be no good reason why an independent collateral agreement, given by way of guaranty or other security, should not outlive the remedy upon the debt which it was given to secure, under proper circumstances."

Section 67d of the Bankruptcy law of 1898 provides: "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act." In this case there is no question of notice of the assignment, nor was it such a one as required any notice to be given, consequently we think the assignment in question was one "not affected by this act."

We think the decided weight of authority is to the effect that a discharge of a debtor in bankruptcy is but a personal release, and does not exonerate the effects of the debtor to which a valid lien has attached and which is not expressly annulled by the provisions of the Bankruptcy act.

The assignments of error, we think, are without merit, and the judgment of the Appellate Court should be and is affirmed.

Judgment affirmed.[14]

[14] A mortgage which is fraudulent as against creditors, by common law, can be set aside by the trustee in bankruptcy by an appropriate

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BELKNAP *v.* GLEASON.

SUPREME COURT OF CONNECTICUT, 1835.
11 Conn. 160.

Bill in chancery for a foreclosure of a mortgage securing several promissory notes. Defendant pleaded payment and the statute of limitations. The superior court found that more than six years had elapsed since the notes had become due.

WILLIAMS, CH, J. Two questions arise upon the facts in this case: Is the statute of limitations applicable to it; and is there a legal presumption of payment?

As to the first. That no action at law will lie upon these notes, if the statute of limitations is pleaded, can not be doubted. Nor can it be claimed, that this statute, *proprio vigore,* shall operate in a court of equity. But it is claimed, that in analogy to the proceedings at law under that statute, a court of equity will apply it, when the claim comes before that court.

There is no doubt that courts of chancery will not lend their aid to claims which are barred in a court of law. 4 Kent's Com. 187. Lansing v. Starr, 2 Johns. Ch. Rep. 150. Roosevelt v. Mark, 6 Johns. Ch. Rep. 289. Kane v. Bloodgood & al. 7 Johns. Ch. Rep. 90.

But these cases do not prove, nor does the principle require, that when a creditor holds different instruments to secure the same debt, if the remedy upon one of them is barred at law, the remedy upon all is barred in equity; the rule being analogous to the rule of law. The question would then seem to be, does the statute of limitations take away all remedy at law? It is not uncommon that a party may have one remedy, when he has lost the benefit of another. Thus, it was formerly holden, that trover would lie for an article taken wrongfully, although the action of trespass was barred by the statute. Ferriss v. Ferriss, 1 Root. 465. So an action will lie upon an adjustment of accounts, although book debt is barred. Ashley v. Hill, 6 Conn. Rep. 246. So if a horse is taken under such circumstances that trespass will lie, it has been decided, that an action of *assumpsit* may be brought for the avails of the sale, although trespass was barred by the statute. Lamb v. Clark, 5 Pick. 193. Here the debt is secured by notes and a mortgage, each of which requires different remedies, all of which may be pursued at the same time. Assumpsit upon the notes must be brought within six years; an action of ejectment for the land may be brought within fifteen years.

proceeding; likewise, a mortgage which is a preference under the Bankruptcy Act, provided the petition was filed within four months after the mortgage was recorded. And a secured creditor who files a claim against the bankrupt's estate thereby waives his security. Each of these propositions is, of course, but the suggestion of a large topic in bankruptcy law. A distinct set of questions, also of considerable difficulty, arises in regard to the effect of bankruptcy proceedings upon the jurisdiction of the state courts to entertain proceedings for the foreclosure of mortgages upon the property of the bankrupt.

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In this state, where payment after the law day will not defeat an action of ejectment by the mortgagee, it will not be pretended that that action would be defeated by the statute of limitations affecting the note. What analogy requires a court of equity to say, that the remedy at law is gone, and therefore, there is none in chancery? One remedy is indeed gone, and one only. The mortgagee may get and hold possession of this land, by virtue of his legal rights. With what face could the debtor come here for relief? His case, if truly disclosed, would be this: "I owed this debt; gave my notes for it; and mortgaged my land to make it more secure. The creditor, by his kindness or his negligence, has suffered his notes to be barred, by the statute of limitations, and is attempting to collect his debt out of the only remaining security. I have not paid it; but I pray this court, as a court of equity, since the creditor has lost one security, to prevent his making use of the other." The ready answer to this claim, is, that if the statute of limitations protects the debtor at law, he does not need the aid of a court of equity. If it does not, this court ought not, by analogy, to extend this statute to cases where courts of law are not required to do it.

In the high court of chancery in Maryland, it has been expressly decided, that not less than twenty years can operate as a bar of a mortgage or equitable lien, although the bond or note may be barred by twelve or three years. Lingan v. Henderson, 1 Bland's Rep. 282.

Our statute of limitations operates upon negotiable notes in six years; upon notes not negotiable in seventeen years; upon entries on lands in fifteen years. Now, if a note not neogtiable is secured by real estate, and is suffered to lie, without payment of interest and without entry on the lands, for sixteen years, the benefit of the mortgage is lost; but the note remains a subsisting and available security. Had the note been negotiable, and lain more than six years, but less than fifteen, the note would have been subject to the operation of the statute; but the creditor might get possession of the lands. But the remedy now sought is neither a suit upon the notes, nor an action of ejectment for the lands; and of course, neither of the statutes barring those remedies, is strictly analogous. The object sought by the foreclosure, is payment of the notes. The means, however, by which it is sought, is through the medium of another security—that of lands. It is, therefore, much more analogous to the remedy by ejectment at law. There the creditor, by the possession of lands, procures payment of the debt. Here, unless the debt is voluntarily paid by the debtor, the decree in effect gives him the land in satisfaction of the debt. The operation of the decree upon the notes, is merely incidental; but upon the land, it is direct and operative. It is true, that the mortgagee must also shew, that the notes are unpaid. Whether he can do that, under the circumstances of this case, will form the next inquiry.

It is said, there is no debt subsisting; and that, of course, a court

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in chancery can not act. This presents the question, whether the statute of limitations annihilates the debt, or only suspends the remedy.

The statutes of limitations are statutes of repose. They suspend the remedy, but do not cancel the debt. Lord v. Shaler, 3 Conn. Rep. 121-134. They are statutes founded upon principles of policy: "Interest *reipublicae ut finis litium.*" The debt remains, and a suit may be brought upon it, and supported by a subsequent promise. It is said, that the statute relative to lands, not only prevents an entry, but confers a title. Such has been the construction of our statutes; but as it respects personal actions, the construction has been uniform, that the debt is not affected. The words of the statute seem to justify, and indeed require such construction: "No action of account, of debt on book or on simple contract, &c. shall be brought, except, &c."

It has indeed been often remarked, by judges, in giving their opinions, that the statute was made to protect persons, who were supposed to have paid their debt, but had lost the evidence of it. Mountstephen & al. v. Brooke & al. 3 Barn. & Ald. 141 (5 Serg. & Lowb. 245). Or that the debt shall be presumed to be paid. Thornton v. Illingworth, 2 Barn. & Cres. 824. (9 Serg. & Lowb. 257.) Dowthwaite v. Tibbut, 5 Mau. & Salw. 75. Thompson, admr. v. Peniman, 8 Mass. Rep. 133. But that they do not mean by this, that at law the statute of limitations is sufficient evidence of payment, is apparent from the fact, that upon the plea of payment, the statute of limitations was never considered as sufficient evidence. And where twenty years have elapsed, it has been held, that payment of a bond might be presumed. Oswald & al. v. Leigh, 1 Term Rep. 270. But no case is produced from the English books, where a shorter term has been held, of itself, sufficient. * * *

* * * * * * *

It is said, that the court must, if they pass a decree in this case, find, that there is a debt due to the plaintiff; and that the fact thus found, will conclude the defendant, in another action at law, should there remain a balance, after the mortgaged estate is exhausted; and thus the statute of limitations will in effect be nullified. This ground, however, is not tenable. The court must indeed find, that the debt it unpaid; but still this does not settle the question at law, that it is not barred by the statute of limitations. According to the views before expressed, these are entirely distinct questions. The debt may not have been paid; but still the statute may have attached upon it, unless it has been waived, by the defendant. This finding, therefore, will be utterly immaterial, when the question is, whether the debt is barred by the statute of limitations.

Upon the whole, this court is satisfied, that the plaintiff is entitled to a decree, and so advise the superior court.

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The other Judges concurred.
Decree for the plaintiff.[15]

OZMUN v. REYNOLDS.

SUPREME COURT OF MINNESOTA, 1866.
11 Minn. 341.

Action to foreclose a mortgage. Answer that the cause of action did not accrue within six years. Demurrer to the answer overruled by the court below.

WILSON, C. J. I think our statute limiting the time for the commencement of actions applies as well to equitable as to legal proceedings. [His honor here examined the history and phraseology of the statute.] But whatever view may be taken of this question, the defense set up must be overruled. Subdivision 1 of chapter 6 of this chapter of our statutes, above referred to, provides that "an action upon a contract, or other obligation, express or implied," shall be commenced within six years after the cause of action accrues, which the defendant's counsel insists is a bar to this action. This view, which is based on the hypothesis that this is an action upon a contract—the mortgage—does not seem to me tenable, though there are many dicta that seem to support it. In the examination of this case, we need not notice the accidental fact that the mortgage was accompanied by a note, for it is clearly unimportant, so far as the application of the statute of limitations is concerned, whether the mortgagor has, in any way, become personally liable for the sum secured by the mortgage. So, too, I think it is unimportant whether the mortgage contains a power of sale. The question in this case, fairly presented, is, whether an action or suit to foreclose a mortgage, is an action on a contract, within the meaning of our statute above cited. If it is, it must be for the enforcement of such contract, or for damages for its breach, and we must look to the contract to ascertain the nature of the relief, or the measure of damages to which the plaintiff is entitled. An action to foreclose a mortgage (as the expression is ordinarily, but inaccurately, used) is

[15] Compare, Coyle v. Wilkins, 57 Ala. 108; Haskell v. Bailey, 22 Conn. 569; Joy v. Adams, 26 Maine 330; Green v. Gaston, 56 Miss. 748; Hulbert v. Clark, 128 N. Y. 295.

"A few cases apparently adopt this theory (of analogy to an action to recover land) to the extent of holding that, since the defendant's possession must be adverse in order to bar an action to recover land, and since a mortgagor's possession is not adverse to the mortgagee, the right of foreclosure is not barred, as against a mortgagor in possession, even by the lapse of the statutory period after default, unless the mortgagor's possession has become adverse by a repudiation of the mortgagee's rights. Whittington v. Flint, 43 Ark. 504 (semble); Lewis v. Schwenn, 93 Mo. 26; Combs v. Goldsworthy, 109 Mo. 151; Chouteau v. Riddle, 110 Mo. 366; Hodgdon v. Heidman, 66 Iowa 645; Elsberry v. Boykin, 65 Ala. 336." Tiffany, Real Property, § 549, n. 356.

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manifestly not an action to enforce any stipulation or contract expressed in the mortgage, or implied from its language. There is no covenant implied in a mortgage for the payment of the sum intended to be secured, nor are the respective rights of mortgagor and mortgagee (the reciprocal rights of redemption and foreclosure) which exist between these parties secured by their contract; such rights would equally exist if the parties had expressly stipulated to the contrary. No damages can be awarded to the plaintiff unless where the mortgagor has, in some manner, made himself personally liable for the sum secured. There has been no breach of any contract contained in the mortgage, either express or implied, and, therefore, there is no right of action on such contract, either for damages or for a specific performance. The right to apply to the court, either to redeem the premises or foreclose the mortgage, is a right incident to the relation of mortgagor and mortgagee—secured by the law and not by contract. A mortgage is, in form, a conveyance, to be void on the performance of certain conditions. It is true that equity looks upon and treats it merely as an incident to the debt secured—as a lien—but this is not by virtue of the agreement of the parties, but in pursuance of those equitable maxims and rules that have come to be acknowledged as the law of the land. According to the contract of the parties, the plaintiff would be the owner in fee absolute of the mortgaged premises, but equity secures to the mortgagor a right of redemption, and to bar and foreclose the defendant of such equitable right, this action is brought.

Nor is it material whether the court orders a strict foreclosure, as in some places is the practice, or a sale of the premises. The direct operation of the judgment is, in either case, to enforce the lien, and incidentally, in both cases, it ordinarily secures the debt; but from this it does not follow that such action is an action for the recovery of the sum secured, for it is only in such cases where the mortgagor has assumed a personal liability that a personal judgment can be rendered against him. From the fact that a mortgage is now held to be a mere lien, or security, for the debt, it does not follow that, because an action for the recovery of the debt is barred, the enforcement of the lien is also barred. The language of the statute does not justify such conclusions, and the decisions of the courts are nearly unanimous against it. It is well settled that whether the security for a simple contract debt is a lien on personal or real property, the lien is not impaired in consequence of the debt being barred. Belknap v. Gleason, 11 Conn. 160; Angell on Lim. sec. 73, and notes, and cases cited in notes. I think it admits of doubt whether subdivision 1 of section 6 of our statute, above cited, applies at all to equitable proceedings, but even if it does, this case is not within either its letter or spirit, and I think the order appealed from should therefore be reversed, and the cause remanded.[16]

[16] Compare Hale v. Christy, 8 Nebr. 264.

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BERRY, J. I think this is an action upon a contract, but that it is also an action for relief within the meaning of section 12, p. 533. Pub. Stat.;[17] that section 12 controls in cases of this kind, and fixes the period of limitation at ten years under the statute, as it was when this action was brought. This view, of course, leads me to concur in the disposition of the case.

LORD v. MORRIS.

SUPREME COURT OF CALIFORNIA, 1861.
18 Cal. 482.

FIELD, C. J. delivered the opinion of the Court—Baldwin, J. and Cope, J. concurring.

The questions presented by the record for determination are: first, whether, when an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the Statute of Limitations, the mortgagee has any remedy upon the mortgage; and second, whether a party having a subsequent mortgage upon the same premises, executed after the statute has run against the note, can interpose the plea of the statute in a suit to foreclose the first mortgage, and thus secure a priority of lien for his subsequent mortgage. The facts of the case are these: On the fifth of May, 1855, the defendants executed to the plaintiff a mortgage upon the premises described in the complaint, to secure their promissory note to him, of the same date, for the sum of four hundred dollars, payable in three months with interest. The mortgage is not set forth in the record, nor are its contents given. The complaint only alleges that it is of the premises in fee, and contains a clause authorizing the plaintiff, upon default in the payment of the note, to cause a sale of the premises in the manner provided by law, and to retain from the proceeds the amount of the note and interest. We shall assume, therefore, that it is in the common form in use in this State—that of an absolute conveyance, with a condition underwritten that it is executed as security for the note, and will become inoperative and void upon its payment at maturity; otherwise, remain in full force. The mortgage was duly recorded in the office of the Recorder of the county where the premises are situated, within two days after its execution. On the eighth of August, 1855, the note matured, and on the eighth of August, 1859, the period of limitation within which, by the statute, an action could be commenced upon it, expired. Subsequently to this, and on the eleventh of May, 1860, the defendants

[17] "An action for relief not being before provided for must be commenced within ten years after the cause of action shall have accrued."

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indorsed, over their signatures, upon the back of the note, a memorandum to the effect that for value received they "renew, revive, and agree to pay" the note and debt. It would appear that subsequent to the execution of the mortgage, Morris, one of the defendants, disposed of his interest in the premises, for the petition of intervention, and the findings of the Court mention Goodman, the other defendant, and two other persons as being the successors of the defendants. We infer from this, and shall so assume in the consideration of the case, that these parties held the interest of the mortgagors in the premises, and it matters not for the purposes of the appeal in what mode the interest was acquired. Having such interest, they executed on the nineteenth of January, 1860, two mortgages upon the premises—one to the intervenors to secure their promissory note of the same date, for $4,894, payable on or before the fifth of June, 1860, with interest, and the other to one Polson to secure their promissory note to him for $2,185, payable three months after date with interest. This last note and mortgage were assigned to the intervenors, and in July, 1860, both of the mortgages were foreclosed, and the usual decrees in such cases entered. In December, 1860, the present suit to foreclose the first mortgage was commenced, and the owners of the second and third mortgages filed their petition of intervention, alleging that the remedy of the plaintiff upon the note and mortgage to him was barred by the statute, and that the lien of the mortgage was extinct previously to the nineteenth of January, 1860, and if the note had been revived, that such revival did not affect the extinct lien of the mortgage, or not in such manner as to give it any priority over the liens of the mortgages owned by them. The Court held that the liens of the intervenors must be first satisfied out of the proceeds of the mortgaged property, and the lien of the plaintiff be postponed until such satisfaction; and ordered judgment to that effect.

The Statute of Limitations of this State differs essentially from the statute of James I, and from the Statutes of Limitation in force in most of the other States. Those statutes apply in their terms only to particular legal remedies, and hence Courts of Equity are said not to be bound by them except in cases of concurrent jurisdiction. In other cases Courts of Equity are said to act merely by analogy to the statutes, and not in obedience to them. Those statutes as a general thing also apply, so far as actions upon written contracts not of record are concerned, only to actions upon simple contracts—that is, contracts not under seal, fixing the limitation at six years, and leaving actions upon specialties to be met by the presumption established by the rule of the common law, that after a lapse of twenty years the claim has been satisfied. In those statutes where specialties are mentioned, as in the Statutes of Ohio and of Georgia, the limitation is generally fixed either at fifteen or twenty

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years. The case is entirely different in this State. Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject matter and not to the form of the action, or the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. Thus the statute requires an action "upon any contract, obligation, or liability founded upon an instrument of writing," except a judgment or decree of a Court of a State or Territory, or of the United States, to be commenced within four years after the cause of action has accrued. It matters not whether damages be sought for a breach of the contract, and thus an action at law be brought, or a specific performance be prayed, and thus a suit in equity be commenced, the proceeding must in either case be taken within the limitation designated. (See Pearis v. Covillaud, 6 Cal. 617.) The statute, after prescribing certain periods within which actions upon judgments, upon simple contracts, for relief on the ground of fraud, and for other causes, shall be brought, declares, in general terms, that "an action for relief" not thus provided for must be commenced within four years after the cause of action shall have accrued—covering all cases where equitable or other relief may be sought.

A mortgage in this State also differs materially from a mortgage at common law, or a mortgage in our sister States. At common law, a mortgage of real property was regarded as a conveyance of a conditional estate, which became absolute upon condition broken. It gave to the mortgagee, except as otherwise stipulated by provisions inserted in the instrument, a present right of possession. Upon it the mortgagee could enter peaceably, or bring ejectment, or a writ of entry; and in those States where the common law view has been modified by considerations arising from the real object of the instrument, and the nature of the transaction, it is still generally held that, as between the parties, it passes the fee, and gives a remedy to the mortgagee for the possession, though as to third persons it constitutes only a lien or charge, and leaves the mortgagor the owner of the premises. Thus in Ewer v. Hobbs, 5 Met. 3, Chief Justice Shaw, in delivering the opinion of the Supreme Court of Massachusetts, after stating the object of a mortgage, said: "Hence it is that, as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee, because that construction best secures him in his remedy, and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with as the estate of the mortgagor." And in the subsequent case of Howard v. Robinson, 5 Cush. 123, the same distinguished Justice said: "Al-

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though, as between mortgagor and mortgagee, it is a transmission of the fee which gives the mortgagee a remedy in the form of a real action and constitutes a legal seizin, yet to most other purposes, a mortgage before the entry of the mortgagee is but a pledge and real lien, leaving the mortgagor for most purposes the owner." The doctrine with respect to mortgages is very different in this State. Here a mortgage is regarded as between the parties, as well as with reference to the rights of the mortgagor in his dealings with third persons, as a mere security, creating a lien or charge upon the property, and not as a conveyance vesting any estate in the premises, either before or after condition broken. Here it confers no right to the possession of the premises either before or after default, and, of course, furnishes no support to an action of ejectment, or to a writ of entry for their recovery. The language of the statute is express, that it shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without a foreclosure and sale. (See Pr. Act, sec. 260; McMillan v. Richards, 9 Cal. 411; Nagle v. Macy, *id.* 428; Johnson v. Sherman, 15 *id.* 293; Goodenow v. Ewer, 16 *id.* 464; Boggs v. Hargrave, 16 *id.* 563; Fogarty v. Sawyer, 17 *id.* 592.)

From this statement as to the Statute of Limitations, and the operation of a mortgage upon the right of possession in this State, it is evident that the decisions cited from the reports of other States, to the effect that a mortgagee has a remedy upon his mortgage after the Statute of Limitations has run upon the promissory note for the payment of which the mortgage was executed, have no application to the questions presented for consideration in the case at bar. Those decisions are founded upon distinctions made by the Statutes of Limitations of those States, which do not exist in the statute of this State, or upon the right of possession which there accompanies the ownership of the mortgage. Thus in Elkins v. Edwards, 8 Geo. 326, which was a suit for the foreclosure of a mortgage, the Supreme Court of Georgia said: "Because the remedy on the note is barred by the statute in six years, it does not follow that the creditor's remedy on the mortgage, being a sealed instrument, is also barred. The creditor's remedy on the mortgage is not barred until twenty years—the debt being unpaid." So in Thayer v. Mann, 19 Pick. 535, which was a writ of entry to recover possession of the mortgaged premises, the Supreme Court of Massachusetts said: "The creditor has a double remedy, one upon his deed to recover the land, another upon the note to recover a judgment and execution for the debt; and it does not follow that he can not recover on one, although there may be some technical objection or difficulty to his remedy upon the other." These decisions are no authority in the case under consideration for the reasons already given, that the statute makes no distinction in the period of limitation between a simple contract in writing

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and a contract under seal, and a mortgage deed here does not confer any right of possession upon the mortgagee. It is undoubtedly true, as stated by the Court in the case from Georgia, that the creditor stipulated by contract for two remedies against his debtor to enforce the collection of his demand—the one by action upon the note, and the other by petition and foreclosure upon the mortgage. Similar remedies he can pursue in this State. He can proceed upon the note, and take an ordinary money judgment for the amount due; or he can sue in equity upon the mortgage, and take a decree for its foreclosure and the sale of the premises. The difference is, that here the limitation prescribed to the equitable suit is the same as that prescribed to the action at law. The mortgage is as much within the general designation of a "contract, obligation, or liability, founded upon an instrument of writing," as is the note itself.

We do not question the correctness of the general doctrine prevailing in the Courts of several of the States, that a mortgage remains in force until the debt, for the security of which it is given, is paid. We only hold that the doctrine has no application under the Statute of Limitations of this State. A mortgage is a specialty, and is not within the terms of the English statute, or of the statutes of most of the States. An action founded upon such specialty can only be met by proof of payment. The payment may be established by direct evidence of the fact, and it may be presumed from the lapse of twenty years, when such presumption is not countervailed by evidence from the mortgagee. "Thus," says the Supreme Court of Maine, in Joy v. Adams, 26 Maine, 333, "a mortgage security has not been deemed to be within any branch of the Statute of Limitations. He who would avoid such security must show payment; otherwise, the mortgagee will not be precluded from entering upon and holding possession of the mortgaged premises. The mortgagor has not been allowed to defeat such right by showing merely that the personal security, to which the mortgage security is collateral, has become barred (Thayer v. Mann, 19 Pick. 535); but he has been allowed to allege payment, and for proof to rely upon the lapse of time, when it amounted to twenty years from the accruing of the indebtment. Such a lapse of time has been deemed to be sufficient for the purpose, in the absence of any countervailing considerations. This is admitted as a presumption of law, which may be removed by circumstances tending to produce a contrary presumption." The view thus stated is met by our statute, which embraces a mortgage security within its terms. Here payment may be pleaded, and so may the statute itself without reference to the fact of payment.

Our conclusion, therefore, upon the first question presented is, that where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the statute, the mortgagee has no remedy upon the mortgage; that though distinct

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remedies may be pursued by him, the limitation prescribed is the same to both.

The second question is one of easy solution. The mortgagor, after disposing of the mortgaged premises by deed of sale, loses all control over them. His personal liability thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises. He is as to the premises thenceforth a mere stranger. And if, instead of selling the premises, he execute a second mortgage upon them, he is equally without power to destroy or impair the efficacy of the lien thus created. But it is said, that the plea of the statute is a personal privilege of the party, and can not be set up by a stranger. This, as a general rule, is undoubtedly correct with respect to personal obligations, which concern only the party himself, or with respect to property which the party possesses the power to charge or dispose of. But with respect to property placed by him beyond his control, or subjected by him to liens, he has no such personal privilege. He can not at his pleasure affect the interests of other parties. His grantees or mortgagees, with respect to the property, stand in his shoes, and can set up any defense that he might himself have set up to the action, either to defeat a recovery of the property or its sale. In the case at bar, the defendant Morris had sold his interest in the mortgaged premises; and his grantees, with the other defendant, executed the second and third mortgages after the statute had run upon the note secured by the first mortgage. The subsequent revival of that note continued the personal liability of the defendants. Whether it also revived the mortgage executed by them it is unnecessary to express any opinion, as the defendants do not appeal from the decree. The revival could not affect, and did not affect the previously acquired liens of the second and third mortgages upon the property; and the intervenors holding those mortgages could interpose the statute to the enforcement of the first mortgage, so far, at least, as to secure a priority in their liens over that mortgage. The ruling of the Court below, therefore, in postponing the lien of the first mortgage, assuming that the lien was revived, to the liens of the subsequent mortgages, was clearly correct.

Judgment affirmed.[18]

[18] Compare, Bridges v. Blake, 106 Ind. 332; Emory v. Keighan, 88 Ill. 482; Chick v. Willetts, 2 Kans. 384; Goldfrank, Frank & Co. v. Young, 64 Tex. 432. See Jones, Mortgages, § 1198.

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UNION WATER CO. v. MURPHY'S FLAT FLUMING CO.

SUPREME COURT OF CALIFORNIA, 1863.
22 Cal. 621.

CROCKER, J., delivered the opinion of the Court—Cope, C. J. and Norton, J. concurring.

This is an action to foreclose a mortgage. No note or other written obligation to pay the money appears to have been executed, nor does the mortgage contain any covenant or agreement to pay the mortgage debt. The action was commenced more than two years and less than four years after the time of payment of the money specified in the mortgage, and the appellant therefore contends that the action is barred by the Statute of Limitations. It is true that in the absence of a direct agreement to pay the money specified in the mortgage, the plaintiff is confined to his remedy against the mortgaged property, and can have no personal judgment against the mortgagor. (Shafer v. The Bear River and Auburn W. and M. Co., 4 Cal. 294; Brooks v. Maltbie, 4 Stew. & Porter, 96; Hunt v. Lewin, *id.* 138; Hickox v. Lowe, 10 Cal. 210.) But it does not follow that because there is no personal liability the action is barred in two years. The action is upon a contract "founded upon an instrument of writing," to wit, the mortgage, and is not therefore barred until four years after the cause of action accrued. This point, therefore, is not tenable.

On petition for rehearing, the following opinion was delivered by Crocker, J.—Norton, J., concurring.

Some corrections of our former opinion are necessary, and a more full statement of our views upon one point may be proper. In the former opinion it is stated that in the absence of a direct agreement to pay the money specified in the mortgage, the mortgagee can have no personal judgment against the mortgagor. That was a point not necessary to be determined in this case, and should have been omitted, as it was not fully discussed by the parties in their briefs. The question whether an action to foreclose a mortgage is barred when the debt it was given to secure is barred, should properly have been more fully explained.

In most cases, the debt secured by a mortgage is evidenced by a writing in some form, either by a covenant or agreement to pay it in the mortgage, or by some independent written contract, such as a note, bond, or agreement. In such cases the same clause in the Statute of Limitations, fixing four years as the period of time which will bar the demand, applies to both the debt and the mortgage, and thus expressions are found in some cases of that character, to the effect that the mortgage is barred by the same lapse of time as the

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debt, which is correct when applied to cases where the debt and the mortgage are both evidenced by writing. In the present case, however, it appears that the debt is not evidenced by a written contract, either in the mortgage, or by a separate instrument. The Statute of Limitations does not operate as a payment or discharge of the debt, and the mortgagee still has the right to enforce any right of action arising out of the contract of the mortgagor, not barred by the Statute of Limitations. In this case his right to a personal judgment against the mortgagor is barred by the statute, the contract to pay the debt not being in writing, and the action not having been commenced within two years from the time the cause of action accrued. But the debt itself not being in fact paid or satisfied, and the contract, so far as it relates to the lien upon the property, being in writing, and not barred by the Statute of Limitations relating to written contracts, the mortgagee has a right to enforce the right of action against the mortgaged property, because the action, to that extent, is "upon a contract, obligation, and liability, founded upon an instrument of writing." This right of action is not therefore barred until the expiration of four years from the time the cause of action accrued, and the action in this case having been brought within the four years, it is not barred by the statute. The rehearing is denied.[19]

CLINTON COUNTY v. COX.

SUPREME COURT OF IOWA, 1873.
37 Iowa 570.

Action in chancery instituted by plaintiff to foreclose a mortgage upon lands in Clinton county. Everhart, who purchased the land from Cox, was made a defendant. Butterfield filed a cross-petition setting out that Cox, the grantor in the mortgage in suit, on the 6th day of November, 1857, executed to him a deed of trust to secure certain notes before given, and since the 1st day of June, 1865, has been a non-resident of the State. The cross-petition asks that the deed of trust be foreclosed against the land.

[19] Compare, Duke v. State, 56 Ark. 485; Browne v. Browne, 17 Fla. 607; Elkins v. Edwards, 8 Ga. 325; Henry v. Confidence Mining Co., 1 Nev. 619.

In several states, there is a statute expressly limiting actions for the foreclosure of mortgages.

The period usually prescribed by statutes of this type is longer than that fixed for an action at law on the debt secured. Hence the question has arisen whether a foreclosure suit, in so far as it seeks a deficiency decree, is limited by the one provision or the other. The answer seems to have been unanimous that the provision limiting an action on the debt governs. See 21 L. R. A. 550, note.

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Everhart demurred to Butterfield's cross-petition on the ground that it shows the cause of action therein set out to be barred by the statute of limitations. The demurrer was sustained, and Butterfield appeals.

BECK, CH. J.—The facts upon which the only question involved in this case arises are these: The deed of trust and notes held by Butterfield were executed more than ten years prior to the commencement of the suit, but Cox, who executed them, has been a non-resident of the State for a sufficient time to take an action against him upon the notes out of the operation of the statute of limitations. Rev., § 2745.[20] A deed of trust to secure the payment of money is enforced by foreclosure as a mortgage. Rev., § 3673. Counsel agree that, in this case, it is to be considered as a mortgage. Is Butterfield's remedy by foreclosure against the land barred by the statute? This is the sole question presented by the case for our decision.

Under the laws of this State a mortgage conveys no interest in, or title to, lands, but is simply a lien thereon for the purpose of securing the indebtedness which is its foundation. It is an incident—a security, in the nature of a lien—of the debt. It survives until the debt be paid or discharged, or the mortgage is released. It is a convoy bearing a lien for the protection of the debt, and as long as that exists it is not relieved of the duty of protection or rendered ineffective for that purpose. When the debt is discharged, or, by operation of law, may no longer be enforced, its functions terminate, and not before. Gower v. Winchester, 32 Iowa, 303; Burton v. Hintrager, 18 *id.* 348; State v. Lake, 17 *id.* 215; Vannice v. Bergen, 16 *id.* 555; Crow, McCreery & Co. v. Vance, 4 *id.* 435; Hendershott v. Ping, 24 *id.* 134; Packard v. Kingman, 11 *id.* 219.

These principles determine the question before us, for, unless it appears that the debt is discharged, or is, under the law, no longer capable of being enforced, the deed of trust stands as a security for its payment. The non-residence of the debtor Cox, arrested the operation of the statute of limitations, and the remedy upon the indebtedness still exists. The lien of the deed of trust may be enforced to satisfy the debt.

These doctrines are so well supported by the authorities cited, and the conclusion we reach is so plainly deducible therefrom, as to forbid discussion. We have held, applying the same principles, that an admission of a debt and a new promise to pay, which suspends

[20] Section 2745 read, "The time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation above prescribed."

Section 2740 read, "The following actions may be brought within the time herein limited respectively after their causes accrue. * * * (4) Those founded on written contracts, * * * and those for the recovery of real property, within ten years."

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the operation of the statute of limitation, keeps alive the lien of a mortgage given to secure the indebtedness. Mahon v. Cooley et al., 36 Iowa, 479. The case is not distinguishable in principle from the one before us. In each the debt would have been barred but for the suspension of the operation of the statute, in the one case by a new promise, in the other by non-residence.

The argument of appellee's counsel, based upon the fact that Butterfield could have brought an action to foreclose the mortgage within the ten years, upon service of process by publication, notwithstanding the non-residence of Cox, is answered by the case just cited. In that case an action could have been brought before the time fixed by the statute, ten years, expired. Counsel contend that as ten years have run in which an action could have been brought, it is now limited. But the law does not so provide, and, in the case cited, we have, in effect, held otherwise. But in truth, the time of limitation provided for by the statute has not expired, for the period of the non-residence of Cox is expressly taken therefrom. This is a sufficient answer to the argument.

The conclusion we reach, it is thought by appellee's counsel, will, in this and other like cases, work hardship. Lands may be purchased upon which old, unsatisfied mortgages may rest, under the supposition that they are satisfied or barred by the statute, and may be subjected to such liens in the hands of the purchasers. But the hardships in such cases result not from the law, but from the parties acting under a mistaken notion of their rights, and relying upon presumptions and protection not recognized by the law. Against hardships thus arising courts can extend no protection.

The judgment of the district court upon the demurrer is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.[21]

[21] "The grounds upon which a majority of this court holds that Waterson and Edwards cannot plead the statute of limitations are as follows: Waterson and Edwards have merely succeeded to the rights of Pearsoll. They stand in his shoes. They have got just what he would have if he had not transferred his interest in the land to them. They have nothing more than he at any time had the right to transfer to them. The stream has not risen and cannot rise higher than the fountain, nor can they by their purchase of Pearsoll's interest in the land cast additional burdens and inconveniences upon the holder of the mortgage. And therefore, as Pearsoll has never obtained nor had the right to plead the statute of limitations, his grantees, Waterson and Edwards, have no such right." Valentine, J., in Waterson v. Kirkwood, 17 Kans. 9.

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PETERS v. DUNNELLS.

SUPREME COURT OF NEBRASKA, 1877.
5 Nebr. 460.

MAXWELL, J.

This is an action to foreclose a mortgage on certain real estate in Sarpy county. The note was due and payable August 31, 1859. The petition, in addition to the usual averments in an action of foreclosure, alleges that the defendant before the maturity of the note removed from the state and has continued to reside out of the state ever since.

The defendant demurred to the petition on the ground the facts stated therein were not sufficient to constitute a cause of action. The demurrer was overruled by the court. The defendant then answered the petition alleging among other grounds of defense, that the cause of action did not accrue within ten years next before the commencement of the action. Testimony was taken and a decree rendered in favor of the plaintiff. The defendant appeals to this court.

The principle is well settled under our code that where it appears on the face of the petition that the cause of action arose at such a period that under the statute of limitations no action can be brought, the defendant may demur to the petition on the ground that it does not state facts sufficient to constitute a cause of action. Section ten of the code of civil procedure provides that "an action shall be commenced within five years upon a specialty, or any agreement, contract, or promise in writing." The proviso to section seventeen, which took effect September 1, 1866, is "that the absence from the state, death, or other disability of a non-resident, save the cases mentioned in this section, shall not operate to extend the period within which actions *in rem* shall be commenced by or against such non-resident and his representatives."

What is an action *in rem?* In Woodruff v. Taylor, 20 Vt., 65, the Supreme Court of Vermont say: "The object and purpose of a proceeding purely *in rem* is to ascertain the right of every possible claimant; and it is instituted on an allegation, that the title of the former owner, whoever he may be, has become divested, and notice of the proceeding is given to the whole world to appear and make claim to it. From the nature of the case the notice is constructive only as to the greater part of the world." "But beside these, there is another class of cases, which may, perhaps, to some extent, be considered as proceedings *in rem,* though in form they are proceedings *inter partes.* An attachment of property in this state, where the court has jurisdiction of the property, but not of the person of

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the defendant, and a sale of it (or a levy upon it if it be real estate), on execution, is in the nature of a proceeding *in rem.*"

The payment of a debt in obedience to the order of the court which issued the attachment, will protect the garnishee, not only against the defendant, but against third person claiming under him, by an assignment made after notice was served on the garnishee.

While proceedings *in rem* appear originally in England to have been restricted to cases arising in the Spiritual, admiralty, or prize courts, such as those relating to the revenue, condemnations of captured property, divorce and alimony, and probate of wills and letters of administration, it will not be contended that such restrictions prevail at the present time. In this country the courts have generally held proceedings *in rem* to include proceedings by creditors against the property of their debtors. "In such cases, for all the purposes of the suit, the existence of the property so seized or attached within the territory, constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment. But if the defendant has never appeared and contested the suit, it is to be treated to all intents and purposes as a mere proceeding *in rem,* and not as personally binding on the party as a decree or judgment *in personam;* or in other words, it only binds the property seized or attached to the extent thereof." Story's Conflict of Laws, Sec. 549; Andrews v. Herriot, 4 Cowen, 520, note; Holmes v. Rawson, 20 Johns., 229; McDaniel v. Hughes, 3 East., 336.

This action, so far as it is sought to subject the mortgaged property to the payment of the debt, is clearly a proceeding *in rem,* and more than five years having elapsed after the law took effect, before the commencement of the suit, the action is barred by the statute of limitations.

In Kyger v. Ryley, 2 Neb., 20, this court held that if a recovery upon a note secured by mortgage, is barred by the statute of limitations, an action for foreclosure of the mortgage is also barred; the demurrer to the petition, therefore, should have been sustained.

The judgment of the district court is reversed and the cause remanded for further proceedings.

Reversed and Remanded.

THE COLONIAL MORTGAGE CO. v. THE NORTHWEST THRESHER CO.

SUPREME COURT OF NORTH DAKOTA, 1905.
14 N. Dak. 147.

ENGERUD, J. This is an action to foreclose a mortgage upon 160 acres of land situated in Dickey county. The mortgage was exe-

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cuted on May 16, 1883, and recorded on June 11, 1883. It was given by Fred West, who was then the owner of the land, to secure his note for $335 of even date. The note became due November 1, 1888. No payments have been made upon it. In the fall of 1887 West moved from the territory of Dakota, and has since been absent from this jurisdiction. In December, 1887, after leaving the territory, he conveyed the land to E. S. Brown, receiver of the Northwestern Manufacturing and Car Company, a Minnesota corporation. On February 1, 1888, Brown conveyed to the Minnesota Thresher Manufacturing Company, also a Minnesota corporation. Both deeds expressly except the plaintiff's mortgage from the covenants of warranty. On August 7, 1901, the last-named grantee conveyed to R. H. Bronson, who had been appointed receiver for said corporation, and on August 9, 1901, the latter conveyed to the Northwest Thresher Company, a Minnesota corporation, the defendant in the present action. These several corporations had complied with the laws of the territory and state, and were at all times amenable to suit in this jurisdiction. The mortgagor and debtor is not made a party to this action. The only relief sought is a decree for the foreclosure of the mortgage and the sale of the mortgaged premises to satisfy the debt. The defendant interposed as its sole defense the statute of limitations. This defense was overruled by the trial court, and judgment was rendered as prayed for in the complaint. The defendant has appealed from the judgment, and demands a review of the entire case in this court, under section 5630, Rev. Codes 1899.

The only question involved upon this appeal is whether the statute of limitations is available to this appellant as a defense against the plaintiff's action. The time within which an action to foreclose a mortgage of real property must be commenced in this state is limited to ten years from the time the cause of action accrued. Rev. Codes 1899, sections 5199, 5200. If, when a cause of action shall accrue against any person, he shall be out of the state, the statute does not begin to run until his return into the state. Rev. Codes 1899, section 5210.[22]

[22] Section 5200 read, "Within ten years: * * * (2) An action upon a contract contained in any conveyance or mortgage of or instrument affecting the title to real property except a covenant of warranty, * * *."

Section 5210 read, "If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited after the return of such person into this state; and if after such cause of action shall have accrued such person shall depart from and reside out of this state or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." There was no express exception of actions in rem from the operation of this section.

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Appellant first contends that this action is one *in rem* against the mortgaged property, and hence that the several objections which will be hereafter noticed, urged against the defense of the statute on the ground that the person against whom the cause of action accrued was absent from the state, have no application. We are agreed that this is not an action *in rem,* but an action *in personam.* Our views on this subject are fully and clearly expressed by Judge Mitchell in Bardell v. Collins, 44 Minn. 97: "It is not an action *in rem,* but an action *in personam.* It is true, it has for its object certain specific real property against which it is sought to enforce the lien of the mortgage, and in that sense it partakes somewhat of the nature of a proceeding *in rem,* but not differently, or in any other sense, than do actions in ejectment, replevin, for specific performance of a contract to convey, to determine adverse claims to real estate and the like. The rights and equities of all parties interested in the mortgaged premises are to be adjusted in the action, which proceeds, not against the property, but against the persons; and the judgment binds only those who are parties to the suit and those in privity with them. Whalley v. Eldridge, 24 Minn. 358. Next, it is not only an action *in personam,* but is also strictly judicial in its character, proceeding according to due course of common law, like any other action cognizable in courts of equity or common law." We are all, therefore of the opinion that the absence from the state of the person against whom the cause of action accrued stays the running of the statute of limitations against an action to foreclose a mortgage, the same as in any other action *in personam.*

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This brings us to the question upon which the members of this court are unable to agree. Did the absence from the state of the mortgagor and debtor, West, prevent the running of the statute against this suit to foreclose the mortgage? The courts of Illinois, Texas, Kansas and Iowa hold that the debtor's absence, even though he has parted with the title to the mortgaged premises, tolls the statute. In California, Washington, Oregon, Nebraska, Missouri, New York and South Carolina the contrary has been held. The majority of the court has reached the conclusion that the absence of West did not toll the statute. Our attention has been called to the following cases from Illinois: Emory v. Keighan, 94 Ill. 543; Schifferstein v. Allison, 24 Ill. App. 294; *Id.,* 123 Ill. 662; Banking Ass'n v. Bank, 157 Ill. 524; Jones v. Foster, 175 Ill. 459; Richey v. Sinclair, 167 Ill. 184. Analysis will show that none of these cases are authority in this jurisdiction. In Emory v. Keighan, Banking Ass'n v. Bank and Jones v. Foster, the facts were that the owner of the equity of redemption had been absent from the state; and in Schifferstein v. Allison a partial payment had been made within the statutory period by the owner of the fee. In Richey v. Sinclair,

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however, the mortgagor had been absent from the state after he had parted with the title, and it was held that his absence prevented the statute from running in favor of his grantee. The reasoning in the last case cited, as well as in the others from that state, is based upon two propositions, which will be found most clearly set forth in Pollock v. Maison, 41 Ill. 516; (1) A mortgage was there regarded as a conveyance of an estate in land, defeasible only by the extinguishment of the debt. (2) The statute of limitations was regarded as creating a presumption of payment or release of the debt by lapse of time, and hence the neglect of the creditor to commence an action to recover his debt within the statutory period was presumptive evidence that the debt was extinguished. It followed as a necessary consequence that, if the debt was extinguished, the mortgagee's estate was likewise extinguished, and, conversely, if the debt was not extinguished, the mortgagee's title was not defeated. As to whether the later rulings in Illinois are sound in principle, in view of the changes made by the legislature of that state in the limitation laws since the decision in Pollock v. Maison, we venture no opinion. See, however, Tate v. Hawkins, 81 Ky. 577. It is manifest that the decisions from Illinois proceed upon a theory that is untenable in this state. Here, under the express provisions of our Civil Code a mortgage is a mere lien, and conveys no estate in the land. Rev. Codes 1899, section 4699; Halloran v. Holmes, 13 N. D. 411. The statute of limitations of this state does not create presumptions or extinguish obligations. It merely bars the remedy upon which it operates, if the defendant elects to avail himself of the statutory defense by answer. Satterlund v. Beal, 12 N. D. 122; Wood on Limitations, section 5; Fowler v. Wood, 78 Hun, 304, affirmed 150 N. Y. 584. In Oregon and Nebraska it was held that the absence of the mortgagor did not toll the statute, because the action to foreclose was an action *in rem*. Anderson v. Baxter, 4 Ore. 105; Peters v. Dunnells, 5 Neb. 460. We can not follow these cases, because we hold that this action is not *in rem*. The decisions from Texas, Kansas and Iowa are in point, but, in our opinion, those decisions rest on propositions which are as unsound in principle as they are opposed to precedent. They lead to absurd and unjust results, and thwart the object sought to be obtained by the statute, instead of promoting that object and furthering justice. Cases fairly representing the views of the Texas courts are Ewell v. Daggs, 108 U. S. 143; Falwell v. Hening, 78 Tex. 278. From Kansas may be cited Waterson v. Kirkwood, 17 Kan. 9, and Schmucker v. Sibert, 18 Kan. 104; and from Iowa, Clinton Co. v. Cox, 37 Iowa, 570; Brown v. Rockhold, 49 Iowa, 282; Robertson v. Stuhlmiller, 93 Iowa, 326; and Leeds Lumber Co. v. Hawroth, 98 Iowa, 463.

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The decisions in Kansas, Iowa and Texas are erroneous, because

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those courts have misapplied the doctrine that a mortgage is a mere incident of the debt it secures. It is true that, by reason of this relationship of the mortgage to the debt, anything that operates to extinguish the latter necessarily discharges the former, because the incident can not survive the principal. These courts, however, fail to distinguish between the extinguishment of the debt itself and the absence or loss of a remedy to enforce the personal liability for it. The failure to make the distinction is apparently due to the fact that those courts have assumed, as it was expressly declared in Schmucker v. Seibert, 18 Kan. 104, 109; and in Duty v. Graham, 12 Tex. 427, 435, 436, that because the mortgage is an incident to the debt, therefore the remedy to enforce the lien was also a mere incident or part of the remedy or cause of action against the debtor to enforce his personal liability. This reasoning, and the propositions upon which it rests, are in direct conflict with the overwhelming weight of authority. Joy v. Adams, 26 Me. 330; Thayer v. Mann, 19 Pick. 535; Richmond v. Aiken, 25 Vt. 324; Baldwin v. Norton, 2 Conn. 161; Pratt v. Huggins, 29 Barb. 282; Fowler v. Wood, 78 Hun, 304; Colton v. Depew, 60 N. J. Eq. 454; Demuth v. Bank, 85 Md. 315; Arthur v. Screven (S. C.), 17 S. E. 640; Elkins v. Edwards, 8 Ga. 326; Bizzell v. Nix, 60 Ala. 281; Browne v. Browne, 17 Fla. 607; Kendall v. Clarke, 90 Ky. 178; Tate v. Hawkins, 81 Ky. 577; Ins. Co. v. Brown, 11 Mich. 265; Wisell v. Baxter, 20 Wis. 680; Whipple v. Barnes, 21 Wis. 332; Lewis v. Schwenn, 93 Mo. 26; Bush v. White, 85 Mo. 339; Bank v. Guttschlick, 14 Pet. 19-30; Eubanks v. Leveridge, 4 Sawy. 274. It has been held that the two causes of action could not even be joined in the absence of a statu tory provision to that effect. Ins. Co. v. Brown, 11 Mich. 265; Borden v. Gilbert, 13 Wis. 670; Stilwell v. Kellogg, 14 Wis. 461; Cary v. Wheeler, 14 Wis. 281; Faesi v. Goetz, 15 Wis. 231; Doan v. Holly, 25 Mo. 357, and 26 Mo. 186.

The doctrine established by the foregoing cases is well stated by Judge Deady in Eubanks v. Leveridge. The case was tried in the federal court in Oregon, and, of course, the decision of the Supreme Court of Oregon on the question involved was conclusive on the federal court sitting in that state. The state court had held that an action to foreclose was not barred by the absence of the mortgagor after he parted with the title, because the action was *in rem;* but Judge Deady reached the same conclusions for reasons different from those of the state court. He said: "But I apprehend the true doctrine to be that the remedy upon the note and mortgage is, like the transaction itself, twofold. The making and delivery of the note, and the failure to pay the same according to its tenor, gives the holder thereof a right of action against the maker, upon which he can obtain a personal judgment for the sum due thereon. So the execution and delivery of the mortgage creates a lien upon the prop-

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erty included in it to secure the payment of the sum mentioned in the note, and, in case of a default in such payment, a suit may be maintained upon this 'sealed instrument,' the mortgage, to enforce such lien for the purpose of paying the debt. Notwithstanding section 410 of the Code provides that in a suit 'to foreclose a lien, where there is also a personal obligation for the payment of the debt,' in addition to the decree of foreclosure sale, 'a decree may be given against the person giving the same for the amount thereof,' yet I apprehend that either the remedy upon the personal obligation or the mortgage may be pursued for the collection of the debt without reference to the other. * * * These authorities go to show that the holder of a note and mortgage has two distinct remedies for the collection of his debt, and that they exist and may be pursued independently of each other."

The doctrine recognized and established by these cases has been embodied in our Civil Code, and is expressed by section 4696, Rev. Codes 1899, which declares: "A lien is not extinguished by the mere lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." Bearing in mind the proposition established by the foregoing authorities and embodied in our Civil Code by the section just quoted, that the debt and the mortgage give rise to distinct and independent remedies, either of which may be resorted to within the time limited by the statute for each so long as the obligation secured by the mortgage is not extinguished, it seems to us the question is one of easy solution.

The remedy on the personal obligation for the debt and that on the mortgage may, and ofter must, be pursued against different defendants and in divers jurisdictions. The remedy on the mortgage must be invoked in the jurisdiction where the property lies, and the time within which it must be commenced is governed by the law of that state. The only person or persons affected by that remedy are those who are interested in the property adversely to the mortgage. Those persons are the only necessary parties to such an action. It is against them that the cause of action for the foreclosure of the lien accrues. It is in their favor and for their protection that the statute operates. The acts or situation of the debtor who has no interest in the land clearly should not toll the statute in an action to which he is not a necessary party. It is clear that it is only he in whose favor and for whose protection the statute operates who can waive or deprive himself of its benefits. Such is the reasoning of the courts of California, Washington, New York, Missouri and South Carolina, and we think those decisions are in accord with both law and common sense. Wood v. Goodfellow, 43 Cal. 185; Watt v. Wright, 66 Cal. 202; George v. Butler, 26 Wash. 456; Denny v. Palmer, 26 Wash. 469; Bush v. White, 85 Mo. 339; Ar-

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thur v. Screven (S. C.) 17 S. E. 640; Fowler v. Wood, 78 Hun 304, affirmed in 150 N. Y. 584. See, also, Tate v. Hawkins, 81 Ky. 577.

* * * * * * *

We think that the term "cause of action" as used in the statute of limitations is used, not in the technical sense that Prof. Pomeroy uses it, but the statute uses it in the popular sense of the right to maintain the particular action against which the statute is invoked. It is a matter of common knowledge that such is the common meaning of the term, and that fact is well illustrated by the use of that term in the numerous decisions we have cited. This interpretation of the term serves to promote the object of the statute and further justice and conforms to the requirement "words should be construed in their ordinary sense." Attaching the ordinary meaning to the term "cause of action," it is clear that a cause of action accrues, within the meaning of the statute of limitations, when the holder thereof first obtains the right to resort to that particular form of action for relief. Ganser v. Ganser, 83 Minn. 199.

The question, then, is, against whom did the right of foreclosure accrue? There can be only one answer to that question. It accrued against the person or persons who were interested in the land adversely to the mortgage. These are the only necessary parties defendant. It is their right or title which it is the object of the suit to extinguish by means of a judicial sale, to the end that the proceeds of such sale may be applied to the satisfaction of the debt. Jones on Mortgages (6th Ed.), § 1394 *et seq.* It is entirely immaterial whether that person happens to be the mortgagor and debtor, or some third person holding title subject to the mortgage. In either case the obligation created by the mortgage that the debt shall be paid from a sale of the land in a judicial proceeding is equally binding on the fee owner. The mortgage was a contract with the owner of the fee to the effect that, if the debt was not paid at maturity, then the debt could be collected out of the land by an action against any person who might subsequently become the owner. It was not a contract that the mortgagor would pay, or that he would sell the land and pay, but it was a contract that the land should pay. It was an obligation which became fastened upon the land itself, and was enforceable against any person who might subsequently become the owner. Consequently the failure of the personal debtor to pay at maturity gave the mortgagee a right to maintain an action to enforce the obligation which the mortgage fastened on the land. It manifestly does not lie in his mouth to say that he was not bound to know against whom to commence the action. He had no right to assume that the mortgagor would forever continue to be the owner of the land. The mortgage gave him no assurance on that subject. The statute was notice to the mortgagee that every day's delay in en-

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forcing the mortgage brought him so much nearer to the time when his remedy would be gone. In short, the instant the right to enforce the mortgage arose, that instant the mortgagee was put on inquiry to ascertain against whom the action to enforce it must be brought. It is incorrect to say that this reasoning foists a new contract on the mortgagee without his consent. As stated before, his contract in the mortgage was that the land should be answerable for the debt if the personal debtor failed to pay, but the mortgagor did not agree to continue his ownership of the land nor to personally sell the land. He merely gave the mortgagee a remedy for the collection of the debt from the land by an action to be brought against whomsoever might be the owner when the remedy became available. And the mortgagee's neglect to avail himself of that remedy within the time fixed by the statute is a good defense to the action. Such is the plain language and manifest intent of the statute. Fowler v. Wood, *supra*. It is also just as clear that it is the intent of the statute that the remedy shall not be barred by the lapse of time in favor of a necessary party defendant who is not within the reach of process, so he can be personally served. Yet the Kansas cases lead to the result that, although the owner of the fee is a necessary party, yet his absence from the state does not toll the statute. Hogaboom v. Flower, 72 Pac. 547.

One more point remains to be noticed. Respondent contends that on the facts of this case it must be presumed that the amount of the mortgage debt was retained by West's grantee from the purchase price for the purpose of satisfying the mortgage, and that the land thereby became the primary fund for the payment of the debt; that the land stood charged with a trust in the hands of West's immediate and remote grantees, including this appellant, for the payment out of the land of the mortgage debt; that this trust was one for the protection of West as well as the plaintiff; and, inasmuch as West is still liable for the debt, and could not plead the statute as a defense in this state, therefore the plea of statute of limitations by this defendant ought not in equity to be permitted. To sustain this contention, the court would have to assume the power to ignore the statute of limitations because in its opinion equity requires it. There are only two things which could stay the running of the statute against this action: Absence of the defendant, or an acknowledgment or new promise within ten years, which new promise or acknowledgment can be proved only by a partial payment or written evidence. In this case neither of these are present, and the court has no power to recognize any exceptions to the statute other than those which the legislature has made. Teign v. Drake, 13 N. D. 502. The plaintiff's cause of action accrued in November, 1888, against the Minnesota Thresher Company, and became barred in November, 1898, before this defendant acquired the land.

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The judgment is reversed, and the district court is directed to enter judgment in favor of the appellant and against the respondent for the dismissal of the action and for the taxable costs and disbursements.

[Young, J., delivered a dissenting opinion.]

SECTION 2.—SALE UNDER A POWER.

JOHNSON v. JOHNSON.

SUPREME COURT OF SOUTH CAROLINA, 1887.
27 S. Car. 309.

MR. JUSTICE MCGOWAN. On November 17, 1879, one Joshua M. Johnson, in order to secure a note for $150, due to John H. Neighbors, executed to him a mortgage of a tract of land, containing 114 acres, and Louisa Johnson, the wife of the said mortgagor, relinquished her dower in the said premises. The mortgage contained a power of sale as follows: "But in case of the non-payment of the said sum, &c., * * * then, and in such case, it shall and may be lawful for the said John H. Neighbors, his heirs, executors, administrators, and assigns, and the said Joshua M. Johnson doth hereby empower and authorize the said John H. Neighbors, his heirs, executors, administrators, or assigns, to grant, bargain, sell, release, and convey the said premises, with the appurtenances, at public auction or vendue, at which sale they, or any of them, shall have the right to become purchasers of the said premises, and on such sale to make and execute to the purchaser his, her, or their heirs or assigns forever, a conveyance in fee of the said premises, free and discharged from all equity of redemption, right of dower, and every other encumbrance," &c., &c. On January 6, 1881, the mortgagee, Neighbors, assigned the note and mortgage to the plaintiff, Margaret Johnson, and in the year 1882 Joshua M. Johnson, the mortgagor, died intestate, seized and possessed of the said premises; leaving as his heirs at law, his widow, Louisa Johnson, and five minor children, who are the defendants.

On December 22, 1883, after the death of the mortgagor, Margaret Johnson, the assignee of the note and mortgage, advertised the land for sale in the town of Clinton, County of Laurens, at 12 o'clock m., of January 12, 1884, by posting written notices of the sale on the door of the court house, and at three other public places of the county. This advertisement made no reference to the previous death of the mortgagor, Joshua M. Johnson, or mention of his widow and children, his heirs at law. At the sale, the land was

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bid off by one Pitts for $325, who refused to comply with the terms of sale, and James L. Simpson agreeing to take his bid, on January 24, 1884, a deed was made to him by the plaintiff in her own name, without any reference to the previous death of Joshua M. Johnson, the mortgagor, or mention of his heirs, the widow and children. This deed was recorded. It seems that the sale was reasonably well attended, the widow, Louisa Johnson, with others, being present; and that the land sold for what was considered a fair price. Simpson agreed with the widow, Louisa, that she might remain on the land for the remainder of the year for a certain rent.

Simpson, to whom the land was conveyed, never paid the purchase money, but on January 5, 1885, in pursuance of a previous agreement to that effect, conveyed it back to Margaret Johnson, who credited $195.90, the amount due on the mortgage debt owned by her as assignee, and brought this action against the heirs at law of the deceased mortgagor, Joshua M. Johnson: 1. To confirm the sale and conveyance made by her as assignee. 2. For leave to pay into court the excess of the purchase money over the mortgage debt. And 3. That the plaintiff may be put into possession of the said premises, and for the costs of the action, &c. The minor defendants made formal answer, but the widow, Louisa Johnson, answered resisting the claim, upon the ground that she and her children were in possession as the heirs at law of the mortgagor; and that they were never made parties to any proceeding of foreclosure, so as to divest them of the legal title; and the plaintiff, Margaret Johnson, has no title under the illegal and void sale by her, and that her action should be dismissed.

* * * * * * *

As we understand it, this is an action for the recovery of real estate upon title claimed to arise out of a sale made under a power contained in a mortgage; but if it should be found that said sale was irregular, and the title thereby acquired defective, then incidentally to cure the defect and validate the title. It is familiar doctrine that in an action for the recovery of the possession of real estate, the plaintiff must recover upon the strength of his own title, considered with reference to the time the action was brought. If the title was then perfect, no confirmation is necessary, but if it was then imperfect, we do not clearly see how the court can, by subsequent proceedings, so validate it as to affect retrospectively the right existing when the suit was brought. See Moon v. Johnson, 14 S. C., 434.

It has always seemed to us somewhat anomalous doctrine, that a mortgagor of real estate may include in the mortgage a power to the creditor himself to sell the mortgaged premises without any order of foreclosure in a regular proceeding, such power being entirely *ex parte,* and carrying, as claimed, not only the right to ascertain the

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amount due on the mortgage debt, but to judge of the necessity for a sale, its time, place, terms, &c., and to execute title to the premises so sold. This anomaly is more striking in those States, as in South Carolina, where it is expressly provided by statute that a mortgage of real estate is a mere security, and even after condition broken, the legal title remains in the mortgagor or his heirs. We incline to think that experience in the administration of the law has shown that this effort by a summary proceeding to avoid litigation and expense, has really increased both, and demonstrated the wisdom of Lord Eldon, when he said: "How can it be right that such a clause shall be inserted in a deed under which a party is trustee for himself? * * * Here, too, it must be recollected that this is a clause to be acted upon—not by a middle person, who is to do his duty between the *cestuis que trust*—but the mortgagee is himself made trustee to do all these acts." The same learned chancellor, however, said at the same time: "But it is too much to say that if the one party has so much confidence in the other as to accede to such an arrangement, this court is, for that reason, to impeach the transaction," &c.[23]

While, however, the court will not now set aside a power authorizing the creditor, who is the interested party, to sell lands mortgaged, for the reason that it is the contract of the parties themselves, yet all the authorities agree that "as such power may be so easily used for purposes of oppression, the courts should scrutinize sales made under them very closely." Robinson v. Amateur Association, 14 S. C., 148. From the view the court takes, it will not be necessary in this case to consider whether the power of sale went with the mortgage to the assignee, Margaret Johnson, nor whether the mode of conducting the sale should have been conformed, as far as possible, to that of ordinary judicial sales, nor whether the vendor, Margaret Johnson, when Pitts failed to comply with the terms of sale, had the right to substitute for him as the last bidder Simpson, and without any consideration paid, to accept from him a conveyance for the premises sold. This circuity of conveyance was manifestly designed as the means of carrying back the title to Margaret Johnson, the vendor, and must be considered as substantially the same as if Margaret Johnson, the assignee and vendor, had bid off

[23] Compare Chapter VI, note 1.

In several states, the statutes expressly or impliedly nullify such powers. Hurd's Ill. Stats. (1912) chap. 95, § 22; Brown v. Bryan, 6 Idaho 1; Burns Ind. Stats. (1914), § 1135; Iowa Ann. Code (1897), §§ 4284, 4287; Kans. Gen. Stats. (1909), §§ 5992, 9711; Aultman & Taylor Co. v. Meade, 121 Ky, 241. Nebraska seems to be the only state in which the power of sale is judicially nullified, without statutory ground. See Cullen v. Casey, (Nebr.) 95 N. W. 605; Kirkendall v. Weatherley, 77 Nebr. 421. It should be observed, however, that in several of the states where a power of sale is valid it is not in common use.

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the property at her own sale, and then in her own name conveyed it directly to herself.

The main question is, whether after the death of the mortgagor, Joshua M. Johnson, leaving his widow and children in possession of the premises, the mortgaged premises could be sold and conveyed by Margaret Johnson in her own name, without any reference whatever to the death of the mortgagor or his heirs at law, some of whom were infants. This must, to a large extent, depend upon the determination as to whose the legal estate was at the time of the death of the mortgagor. There can not be the slightest doubt that, at the time of the death of the mortgagor (so far as the mortgage itself was concerned), the title was in the mortgagor, and at his death descended to his heirs. It is true that, according to the common law, a mortgage was a "conveyance of an estate by way of pledge for the security of a debt, and to become void upon the payment of it." But it is quite as clear that in our State, by the act of 1791 (now embodied in section 2299 of the General Statutes), the legal title, upon the execution of a mortgage, remains in the mortgagor, and "the mortgagee shall not be entitled to maintain any possessory action for the real estate mortgaged even after the time allotted for the payment of the money secured; but the mortgagor shall be deemed owner of the land, and the mortgagee as owner of the money lent or due; and shall be entitled to recover satisfaction for the same out of the land by foreclosure and sale according to law." See Simons v. Bryce, 10 S. C., 368; and Warren v. Raymond, 17 S. C., 163.

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As we have seen that the clause in question did not transfer the title which remained in the mortgagor, but only gave a power of sale, that power assuredly could only be executed in the name of the principal. Webster v. Brown, 2 S. C., 429; De Walt v. Kinard, 19 *id.*, 282. It is said, however, that Margaret Johnson did not execute the deed in the name of the principal, Joshua M. Johnson, for the very good reason that at the time of the sale he was dead, and most of his heirs, to whom the title had descended, were infants and incapable of conveying the title.

This fact suggests another difficulty in the way of the plaintiff's recovery on her own title. We think that the power of sale given by Joshua M. Johnson was revoked by his death; and if so, of course, it was incapable of execution. The power of one man to act for another must depend on the will of that other, and when it is withdrawn the power ceases. As the power of sale in this case formed a part of a contract for consideration, it may be conceded that it could not have been revoked in the lifetime of the creator of it; but, nevertheless, we think it was revoked by his death. It certainly was, unless it belonged to that exceptional class where the

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"power is coupled with an interest." Hunt v. Rousmanier's Admnrs., 8 Wheat., 205; Lockett v. Hill, 1 Woods, 558, and cases there cited. Was the power here, in the sense of the rule, "coupled with an interest"?

I freely confess that the phrase, "a power coupled with an interest," never seemed to me to convey a very clear and definite idea. I am content to adopt the views of Chief Justice Marshall upon the subject, as expressed in the case from Wheaton above cited, where he says: "What is meant by the expression, 'a power coupled with an interest'? Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the 'interest' which protects a power after the death of the person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. If we are to understand by the word 'interest' an interest in that which is to be produced by the execution of the power, then they are never united; the power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore can not, in accurate law language, be said to be 'coupled' with it. But the substantial basis of the opinion of the court on this subject is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name—must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it," &c.

We are aware that Mr. Jones (2 Mortgages, section 1794) has expressed the opinion that "the rule is the same in those States where, by statute or adjudication, a mortgage is regarded as a mere security for a debt, passing no title or estate to the mortgagee; the power of sale is coupled with an interest, and is irrevocable, just the same as it is where the common law doctrine, that the mortgage conveys the legal estate, still prevails"—and cites as authority for the proposition the case of Calloway v. People's Bank of Bellefontaine, 54 Ga., 441. But as the learned author in the same book repeatedly declares that the deed of sale under the power should be made by the holder of the legal title, we must suppose that he failed to note clearly the great difference as to title between a common-law mortgage and one executed under a statute such as that in this State.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the cause remanded to the Circuit, with

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leave to the plaintiff to move to amend her complaint so as to pray for a regular judicial foreclosure of her mortgage.

Upon this opinion the Chief Justice and Mr. Justice McIver made the following endorsement:

We concur in so much of this judgment as reverses the judgment of the Circuit Court; but we do not concur in so much of the judgment as allows the palintiff leave to amend, for the reason that, in our opinion, such an amendment as that contemplated would change substantially the claim of the plaintiff and can not be allowed under section 194 of the Code.[24]

VARNUM v. MESERVE.

SUPREME COURT OF MASSACHUSETTS, 1864.
8 Allen (Mass.) 158.

HOAR, J. The plaintiff is the administrator with the will annexed of Patrick Manice, who made a mortgage with a power of sale to the defendant, his wife joining in a release of dower and homestead. The mortgage debt being due and unpaid, the defendant advertised the mortgaged estate for sale, according to the requirements of the power of sale; but before the advertisement had been published the requisite number of times, the mortgagor died. By his will, the real estate was devised to his wife for life or widowhood, with remainder to his brothers and sisters. The mortgagee proceeded to complete the sale after the death of the mortgagor; and after satisfying the mortgage debt, and paying the expenses attending the sale, there is a surplus left in his hands, to recover which this action is brought.

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The first question raised by the bill of exceptions is, whether the sale of the estate by the defendant was valid to pass the absolute title to the property. The objection is, that the death of the mortgagor extinguished the power.

By the power of sale the mortgagee, his executors, administrators or assigns, were authorized to sell the mortgaged premises, and "in his or their own names, or as the attorney of the grantor," to convey the same absolutely and in fee simple to the purchaser; and out of the proceeds to retain sufficient to discharge the mortgage debt, with all costs and expenses, paying the surplus if any to the mortgagor or his assigns.

The question thus presented was argued, but not decided, in the

[24] Compare Wilkins v. McGehee, 86 Ga. 764; Ray v. Hemphill, 97 Ga. 563; Rogers, Heirs of, v. Watson, 81 Tex. 400.

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case of Brewer v. Winchester, 2 Allen, 389; and we believe has not before been judicially determined in this commonwealth. But when the power of sale is to be executed in the name of the mortgagee, we can have no doubt that it may be executd as well after the death of the mortgagor as before. It is a power coupled with an interest; and not merely an interest in the proceeds of the property for the sale of which the power is given, but in the property itself. Strictly speaking, a mortgage vests the whole legal estate in the mortgagee. His title to the land is complete as a legal title, and the power of sale is to relieve him of the equities attached to the mortgage. The power is to be executed out of the estate conveyed, and is not merely collateral to it. Hunt v. Rousmanier, 8 Wheat. 174, 203. 1 Parsons on Con. 62. Wright v. Rose, 2 Sim. & Stu. 323. Clay v. Willis, 1 B. & C. 364.

The strongest form in which the objection to the execution of the power is stated is that which points out the difference between the two estates of mortgagor and mortgagee, each of which is regarded, for some purposes, as a separate legal estate. Until the sale under the power, the equity of redemption remains in the mortgagor, and may be sold or devised by him, or inherited from him, as if the power did not exist. It is only subject to be extinguished by the execution of the power. It is therefore urged that the power of sale can only be considered as a power of attorney; and that the conveyance of the equity of redemption must be made by a separate instrument from that which transfers the mortgagee's estate; because the equity of redemption remains in the mortgagor after he has made the mortgage and the power. But this objection would be equally valid against any conveyance under the power in the name of the mortgagee. If such a conveyance can be sustained, (and it is too late to question that,) it must be held to operate as a mode of foreclosure provided by contract of the parties, so just and equitable in its provisions that it receives the sanction of courts of equity, and taking effect in a manner somewhat in the nature of a power of appointment.

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The advertisement of the sale was precisely in conformity with the requirement of the mortgage; and the expenses for which the defendant asks allowance do not seem objectionable.

Exceptions sustained.[25]

[25] "The only notice published announced that the mortgagee would sell at public auction, at a time named, 'all the equity of redemption of the said Enoch Bartlett in and to the said premises' &c. This was an advertisement of the intended sale of only the equity of redemption, and not of the whole estate in the land. It offered to the public only the mortgagor's interest in the premises, and did not include the mortgagee's. The power was to sell the whole estate, including the equity of redemption; and gave no authority to sell the equity of redemption

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REILLY v. PHILLIPS.

SUPREME COURT OF SOUTH DAKOTA, 1894.
4 S. Dak. 604.

KELLAM, J. The object of this action is to determine the rights, respectively, of the appellants, who were plaintiffs below, and the respondents, who were defendants, in and to certain premises in the city of Sioux Falls. The facts are undisputed and are these: Margaret Reilly, in her lifetime, was the owner of the premises, and executed a mortgage thereon to Andrew C. Phillips, which was duly recorded. The mortgage contained the following power of sale: "And in case default shall be made in the payment of said sum of money, or any part thereof, at the time or times above specified for the payment thereof, or in case of the non-payment of any taxes as aforesaid, or the breach of any covenant or any agreement therein contained, then, and in either case, the whole principal and interest of said note shall, at the option of the holder thereof, immediately become due and payable, and it shall be lawful in such case, for the said party of the second part, (Andrew C. Phillips) his heirs, executors, and administrators or assigns, to grant, bargain, sell, release and convey said premises, with the appurtenances thereto belonging, at public auction, in the manner now, or that may hereafter be, provided by law, and in the name of the grantors, and as their attorney for that purpose hereby duly authorized, constituted and appointed, to make, execute and deliver to the purchaser or purchasers, his, her or their heirs and assigns, forever, a good, ample, and sufficient, deed of conveyance in the law." Margaret Reilly, the mortgagor, died. After her death, the mortgage being due and unpaid, Andrew C. Phillips, mortgagee, began and concluded proceedings for the foreclosure of said mortgage by advertisement as provided by statute, under the power of sale in the mortgage. The proceedings and sale were conducted and made by the sheriff of the county; the said Phillips becoming purchaser, and receiving a certificate of sale, and, after the expiration of the statutory time for redemption, a sheriff's deed, in the usual form. No action or proceedings at law were instituted to recover the debt secured by the mortgage. The plaintiffs, except Thomas H., were the minor heirs

alone. If only the equity of redemption were sold, it is difficult to see what would become of the mortgage. Certainly, a person who might wish to purchase would only infer from the advertisement that he could buy an estate on which the encumbrance would continue. As the notice of sale was not in conformity with the power of sale in the mortgage deed, the attempted sale in pursuance of it was ineffectual, and passed no title which can bar the right of redemption." Hoar, J., in Fowle v. Merrill, 10 Allen (Mass.) 350.

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of Margaret Reilly, and he was her surviving husband. No guardian was appointed for such minor heirs, and no notice of such foreclosure proceedings given them, other than by the publication of the notice of the mortgage sale. After the delivery of the sheriff's deed to the mortgagee and purchaser, Phillips, the plaintiffs tendered to him the amount due upon the mortgage, which he refused. Subsequently Andrew C. Phillips died, and defendants are his widow and heirs. This brief statement of the facts is sufficient for an understanding of the questions involved, no attack being made upon the regularity of the proceedings. The trial court confirmed the title in the defendants and from such judgment plaintiffs appeal.

Two questions cover the discussion of counsel: (1) Did the power of sale in the mortgage terminate at the death of Margaret Reilly, the mortgagor? And (2) if not, did the foreclosure by advertisement and sale cut off the right of the heirs to redeem?

Whether the power of sale, and the right to execute it survived the mortgagor who granted it, depends upon its nature. Was it a naked power, or, as is often expressed, a power coupled with an interest? Counsel on both sides have presented instructive briefs, showing by cited adjudications the views of eminent courts and judges upon the question, which it would seem are not altogether harmonious; but we are inclined to think that the code of our own state furnishes a complete and decisive answer to the question. The power of sale in a mortgage is not treated in our statute as a simple power of attorney, but is declared to be a trust, (Section 4354, Comp. Laws,) and as such is an elemental part of the security, (Section 2829;) and in Section 2813 a distinction between such a power, which is a trust, and a simple power of attorney to convey land, is expressly declared. The power of sale was not, then, a naked, independent power, whose life and effect are to be determined under the principles and rules of agency, but was a substantial part of the security itself. It was as much a part of the right conveyed to the mortgagee as was the lien upon the mortgaged premises. It was a right which Reilly sold to Phillips when he made the mortgage, and for which Phillips paid when he paid for the mortgage. It lasted as long as the security lasted, or until the mortgagee had taken other means to enforce it. It was a power coupled with an interest, and such a power does not terminate with the death of the party conferring it. Comp. Laws, par. 4007. That the power of sale in a mortgage survives, and may be executed after the death of the mortgagor, is at least suggested by Section 5424 Comp. Laws, where it is provided that the surplus must be paid to "the mortgagor, his legal representative or assigns." While the term "legal representatives" does not exclusively mean executors or administrators, it ordinarily does. 13 Amer. & Eng. Enc. Law, p. 221. As before noticed our statute expressly provides that a mortgage may contain a power

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of sale; that it becomes a part of the security; and how it may be enforced. The mortgage in question was made with reference to these provisions, and they became a part of it. Section 5411 Comp. Laws provides that: "Every mortgage of real property containing therein a power of sale, upon default being made in the condition of such mortgage, may be foreclosed by advertisement," etc. No exception or suspension of the right to thus foreclose is made or declared on account of the death or other disability of the mortgagor.

The appellants contend that the concluding words of the power of sale in this mortgage show that it was the intention of the mortgagor that the deed, in case of sale under such provision, should be made in her name and as her act, through and by the mortgagee as her attorney, and that such a power could not be legally executed after her death. The words are: "And in the name of the grantors and as their attorney for that purpose hereby duly authorized, constituted and appointed, to make, execute and deliver to the purchaser or purchasers, his, her or their heirs or assigns, a good, ample and sufficient deed of conveyance, in the law." While we recognize much force in this argument, the fact still remains that by the power of sale she had already authorized the mortgagee to sell the premises, in case of default, "at public auction in the manner now, or that may hereafter be, provided by law." She knew when she granted the power—for she was charged with knowing the law—that the statute definitely provided the means and method of its execution, and she will be presumed to have contracted with reference to it. In such case the statute becomes a part of the contract. State v. Fylpaa, (S. D.) 54 N. W. 599; State v. Foley, 30 Minn. 350. It may be the words first quoted were intended by the parties to afford an additional or cumulative method of executing the power, but we do not think they should be construed to cut off the statutory method. If we are correct as to the theory and effect of the several statutory provisions above referred to, we need not look further for the law which much control us. We think, however, that, independent of these particular provisions, our conclusion upon this question is sustained by general principles of law, and by the preponderance of adjudicated cases. 2 Perry, Trusts, par. 602, says: "It is a universal rule that a power coupled with an interest is irrevocable; and as a power of sale inserted in a mortgage * * * is a power coupled with an interest, it can not be revoked by any act of the donor or grantor of the power. Not even the death or insanity of the grantor or donor will annul the power, or suspend its exercise. The debt remains, the right or lien on the property remains, and the power is coupled with them." See, also, 4 Kent, Comm. 147. That the power of sale in a mortgage is not terminated or suspended by the death of the mortgagor, is directly held in Connors v. Holland, 113 Mass. 50; Varnum v. Meserve, 8

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Allan 158; Hudgins v. Morrow, 47 Ark. 515; Beattie v. Butler, 21 Mo. 313; Jones v. Tainter, 15 Minn. 512, (Gil. 423.) Upon the same principle, and for the same reason, it is held that the subsequent insanity of the mortgagor does not terminate or suspend the power of sale granted before the disability occurred. Encking v. Simmons, 28 Wis. 272; Meyer v. Kenchler, 10 Mo. App. 371; Van-Meter v. Darrah, (Mo. Sup.) 22 S. W. 30; Berry v. Skinner, 30 Md. 567.

Appellants insist that the rule of these cases is not applicable in this jurisdiction, because, under our law, the mortgagor retains the title to the estate mortgaged, contrary to the law prevailing in most of the states whence these decisions come; but we apprehend that, upon principle, that fact ought not to make any difference in respect to the survival of the power. Even in the states where the mortgage is held to convey the legal title to the mortgagee, the transfer is only nominal. It is more of a fiction than a reality. If the mortgagee, who is said to hold the legal title, die, his interest does not pass to his heirs, as real estate, but to his executor or administrator, as personal property. It is a chose in action, precisely as in this state. Hil. Mort. 281. In New York the mortgage does not convey the legal title, and has not, since a very early day, and yet Chancellor Walworth, in Jencks v. Alexander, 11 Paige 624, says that a power of sale in such a mortgage is a beneficial power; that it is a power coupled with an interest, "to the extent of the interest of the mortgagee in the premises." In Wilson v. Trout, 2 Cow. 236, the court says: "The power of the mortgagee to sell the mortgaged premises is undoubtedly a power coupled with an interest." The power of sale in that state is constantly treated as a power coupled with an interest, and the cases are frequent in which it has been executed after the death of the mortgagor. See Anderson v. Austion, 34 Barb. 319; King v. Duntz, 11 Barb. 191; George v. Arthur, 2 Hun 406; Cole v. Moffitt, 20 Barb. 18. The amendment of 1844, of the law regulating sales under such power, expressly recognizes its survival, by requiring that, in case of the death of the mortgagor, notice should be served upon his personal representatives. In Wisconsin the legal estate remains in the mortgagor, but in Encking v. Simmons, *supra,* it was held that the insanity of the mortgagor did not suspend the power. The quality of the power does not depend upon the general character or legal effect of the instrument in which it is granted, but upon whether or not the power itself is coupled with an interest in the subject concerning which the parties are contracting. It would be difficult to justify the conclusion that in one case the mortgagee had an interest in the subject of the mortgage, and in the other case did not. The purpose of the mortgage, and the rights of the parties as mortgagor and mortgagee are the same in both cases. Under either theory the general rights of the mort-

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gagee are the same, with respect to the property mortgaged. He may insure it. He may redeem it from tax sale. He may protect it from waste, even as against him who holds the legal title. We think, both under our statute or without it, the power of sale is one so coupled with an interest that it survives the death of the grantor. The case of Hunt v. Rousmanier, 8 Wheat. 174, strongly relied upon by appellants is distinguishable from this. In that case there was no mortgage or pledge of the property, but a naked power of attorney, authorizing Hunt to sell and transfer it in the name of Rousmanier. A bill of sale was to be given in the name of Rousmanier, and as his act, by his attorney. Neither possession, nor any lien upon or interest in the property, was attempted to be conveyed. In speaking of this case Chancellor Walworth says, in Knapp v. Alvord, 10 Paige, 209, the decision would probably have been different if the property had been delivered to Hunt as a pledge, but under our law mortgaged property is pledged—hypothecated—without delivery.

We are referred to cases not in harmony with the views we have expressed. The strongest one, perhaps, is Johnson v. Johnson, (S. C.) 3 S. E. 606, where the court, after quite a thorough discussion, holds that the power of sale was not coupled with an interest, and consequently expired with the mortgagor. To make the case more applicable here, the learned judge who writes the opinion predicates his argument and conclusion largely upon the fact that there, as here, the mortgage creates a lien only, and does not convey the title. Upon that point, and its effect upon the questions in hand, we have already expressed our views. In that state, however, it would seem from the opinion—and such seems to be the fact, so far as we can ascertain—there is no statute recognizing, or declaring the effect of or providing a method for the execution of, the power. It could be executed only as any other power of attorney, in the name of the principal. A sale, if made, would be in the name and as the act of the deceased principal. Such is not the case here. Our statute provides, and did when this power was created, that a power of sale in a mortgage may be executed by the sheriff of the county in which the mortgaged premises are situated; that the sale may be advertised and made by him, and the deed executed by him, as sheriff. It was so done in this case. As before observed, a power of sale, if such is contemplated in the statute, will be presumed to be created in view of the statute, and that it may be executed in the manner provided by such statute, and not necessarily in the name of the grantor, and not as a simple power of attorney. The other cases cited by appellants are also from states having no statute like ours, so far as we are able to ascertain.[26]

[26] McGuire v. Van Pelt, 55 Ala. 344; Hudgins v. Morrow, 47 Ark. 515; More v. Calkins, 95 Cal. 435; Strother v. Law, 54 Ill. 413; Berry v. Skin-

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This brings us to the second question. Did the sale under such power, conducted, as is conceded, in strict pursuance of the statute, cut off the right of the heirs to redeem after the expiration of a year from the sale? We have already expressed the opinion—and such is, we think, the doctrine of the statute—that when Reilly made the mortgage to Phillips, she conveyed to him, not only the lien upon the land, but the right to enforce it under the power of sale. Such right became property in Phillip's hands, in the same sense that his lien was property. As such, it would pass to his personal representatives at his death, as a part of his estate. Reilly had then left such rights in and to the mortgaged property as she had not conveyed to Phillips. She could leave no more to her heirs than she herself had at the time of her death. Their rights must be measured by hers. They took her place, and might only do, with respect to the property, what she might do. The rights of the heirs having accrued subsequent to the mortgage, they are subordinate to it,—not only to the lien of the mortgage, but to the power of sale which it conveyed as a part of the security. On this ground it was held in Brackett v. Baum, 50 N. Y. 8, that a statutory foreclosure and sale in a purchase money mortgage barred the dower right of the wife, who did not sign the mortgage. By the amendment of the New York statute in 1844, it was required that, if the power of sale be executed after the death of the mortgagor, notice of sale should be given to the administrator or executor of the deceased mortgagor; but in Anderson v. Austin, *supra,* wherein the heirs of the mortgagor sought to redeem, they having had no notice of the sale, the court held that the mortgagee was only required to pursue the procedure provided by the statute, and, if no administrator or executor had been appointed at the time the sale was advertised and made, the provision as to service upon them was inoperative, and, service upon the heirs not being required by the statute, the foreclosure was complete when made in the mode otherwise prescribed by the statute. Demarest v. Wyncoop, 3 Johns. Ch. 129, was an action by heirs, who were infants when the sale was made, to redeem premises sold under a statutory foreclosure by virtue of a power of sale in the mortgage. The foreclosure was prior to the amendment of 1844, and when publication of notice of sale, only, was required. The court denied the right of the heirs to redeem, saying: "The statute has no saving clause for persons laboring under disabilities, but is peremptory that no sale under such power shall be defeated, to the prejudice of any *bona fide* purchaser, in favor of any person claim-

ner, 30 Md. 567; Jones v. Tainter, 15 Minn. 512; Beatie & Others v. Butler, 21 Mo. 313; Muth v. Goddard, 28 Mont. 237; Bergen v. Bennett, 1 Caines Cases (N. Y.) 1; Wilson v. Troup, 2 Cow. (N. Y.) 195; Carter v. Slocum, 122 N. Car. 475; Grandin v. Emmons, 10 N. Dak. 223; Encking v. Simmons, 28 Wis. 272.

See Mechem, Agency (2d Ed.) §§ 570-588, 650-663.

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ing the equity of redemption. Where the statute makes no exception, the court, as I have already shown, can make none, on the ground of any inherent equity applicable to infants." And so Chancellor Kent, in discussing the effect of an advertised sale, pursuant to the statute, under a power of sale in the mortgage, says: "A sale under a power, as well as under a decree, will bind the infant heirs." 4 Kent, Comm. 191. By the statute of our state, no notice of sale is required to be served upon anybody. General notice to all interested is given by publication. There are no parties to the proceeding, as in an action for foreclosure; and yet the proceeding, where authorized by a power of sale in the mortgage, was, without question, intended to take the place of a foreclosure by action, and to have the effect of an old foreclosure in equity. The statute having made no provision for service of notice of the sale either upon heirs or others interested in the mortgaged property, such service, if made, would be entirely voluntary on the part of the mortgagee, and could add nothing to the legal effect of the sale. This court can not add to the statute another provision requiring that an express notice shall be given to minor heirs or their guardian in order to make the foreclosure sale effective against them. If, as the law stands, a foreclosure would be good with such actual notice, it is good without it. The statute expressly gives the right to redeem, within a year from sale, to the mortgagor, or his successors in interest. These must be redemption rights which it was intended to be affected by the foreclosure and sale; otherwise, there would be no occasion for so affirmatively preserving or conferring them. The heirs of a mortgagor, whether minor or adult, are his successors in interest, and included in the class which may so redeem. One of two conclusions seems inevitable: Either a strict pursuance of the statute was intended to, and does, bar the rights of heirs, whether minor or adult, to redeem, except as preserved for a definite time by the statute, or the statute, and the proceeding it authorizes, are entirely unavailable and ineffectual to foreclose the equity of redemption of any person at the time under disability. In our examination, we have found no case announcing or sustaining the latter conclusion, but find so many, some of which are cited above, holding the reverse, that we are constrained to adopt the first proposition as the law. Whether the statute itself is wisely considerate of all the interests that may be affected by such proceeding is a legislative, and not a judicial, question. It has not been questioned but that it was competent for the legislature to bring all the interests within the range of the proceeding by a general publication of the notice, and we think that is the theory and scheme of the statute. We think the judgment of the trial court is correct, and it is affirmed.[27]

[27] Compare, Aiken v. Bridgeford Co., 84 Ala. 295; Penryn Fruit Co. v. Sherman-Worrell Fruit Co., 142 Cal. 643; Mutual Loan & Bk. Co. v.

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GRAY, C. J., in HALL v. BLISS, 118 Mass. 554 (1875). Although equity will not allow the holder of a mortgage containing a power of sale to become a purchaser at a sale under the power, unless expressly so authorized by the terms of the mortgage; Downes v. Grazebrook, 3 Meriv. 200; Dyer v. Shurtleff, 112 Mass. 165; there is no doubt that, under a mortgage containing such provisions as that now before us, [expressly authorizing the mortgagee to purchase] a purchase made by the mortgagee and for his sole benefit is valid and effectual to cut off all right of redemption, provided the mortgagee faithfully discharges in all respects the duties imposed upon him as donee of the power; and that in the case at bar, if the land had been conveyed by him to one purchasing in his behalf, and immediately reconveyed to him by the latter, the power would have been well executed. Dexter v. Shepard, 117 Mass. 480. Wilson v. Troup, 7 Johns. Ch. 25, and 2 Cowen, 195.

The plaintiff contends that the deed executed in this case was void, because it was made by the mortgagee directly to himself. But this position is founded upon a misapprehension of the legal nature and effect of a mortgage with power of sale, and of a deed made in execution of the power.

Such a mortgage vests a seisin and a conditional estate in the mortgagee, with a power superadded to convey an absolute estate by a sale pursuant to the terms of the power. The execution of the power does but change, in accordance with the terms of the mortgage deed, the uses upon which the estate is to be held. The purchaser at the sale takes, not as the grantee of the mortgagee, but as the person designated or appointed by the mortgagee in execution of the power, and derives his title from the mortgagor, as if the

Haas, 100 Ga. 111; Lowe v. Grinnan, 19 Iowa 193; Strother v. Law, 54 Ill. 413; Hall v. Bliss, 118 Mass. 554; Carlisle v. Libby, 185 Mass. 445; Bolles v. Carli, 12 Minn. 113; Sims v. Field, 66 Mo. 111; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45; Grandin v. Emmons, 10 N. Dak. 223; Bancroft v. Ashhurst, 2 Grant (Pa.) 513; Woonsocket Inst. for Savings v. American Worsted Co., 13 R. I. 255; Hampshire v. Greeves, 104 Tex. 620. See Howell's Ann. Stats. Mich. § 13928.

In some states the statutes require personal notice to some or all of the parties interested in the equity of redemption, and the power may itself expressly make such requirement.

It has been held that all requirements of the statutes regulating the sale under a power (which in some states are very elaborate) must be complied with, even though the power makes other provisions or expressly waives them. Webb v. Haeffer, 53 Md. 187; Pierce v. Grimley, 77 Mich. 273; Lawrence v. Farmer's Loan & Trust Co., 13 N. Y. 200; Kerr v. Galloway, 94 Tex. 641. But see Elliott v. Wood, 53 Barb. (N. Y.) 285, 305; Ib. 45 N. Y. 71. On the other hand, it would seem that provisions of the power which are not in conflict with the statute must also be complied with—in other words that the parties may add to, but cannot take from, the statutory requirements. Pierce v. Grimley and Lawrence v. Farmer's Trust Co., supra. But see Butterfield v. Farnham, 19 Minn. 85, holding that additional requirements are of no effect.

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designation or appointment had been inserted in the original deed, and the seisin or interest to serve the estate is raised by that deed. Butler's note to Co. Lit. 271a. 1 Sugd. Pow. (7th ed.) 242. 2 Sugd. Pow. 22, 23. 4 Kent. Com. (12th ed.) 327, 337.

MENZEL v. HINTON.

SUPREME COURT OF NORTH CAROLINA, 1903.
132 N. Car. 660.

[Action to quiet title to land. The defendant claims title by a sale under a power of sale contained in a mortgage.]

CONNOR, J. The Code, Sec. 152 (3) provides that the period prescribed for the commencement of "an action for the foreclosure of a mortgage or deed of trust for creditors with a power of sale of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale becomes absolute, or within ten years after the last payment on the same." We are unable to discover in this language any period of time fixed within which the mortgagee is required to execute the power of sale. It will be observed that this section prescribed the time for bringing an action, (1) for the foreclosure of a mortgage, (2) or deed in trust for creditors with power of sale. The instrument executed by Foreman to Hinton is a mortgage containing a power of sale and is not within the language of the statute. It was not necessary for the mortgagee to institute an action for the foreclosure of the mortgage or the execution of the power; hence no time is fixed by the statute within which he must execute the power. The word "action" in the paragraph evidently has reference to the action for foreclosure and not to the execution of the power of sale, which requires no action. To construe the statute otherwise would be to write into it language which we do not find there.

It must be conceded that the language used by this court in Hutaff v. Adrian, 112 N. C., 259, would seem to sustain the contention of the plaintiff. In that case, the bond for the security of which the mortgage was given was barred by the statute of limitations, the last payment thereon having been made more than ten years before the threatened execution of the power. The mortgagor applied for an injunction to restrain the sale by the mortgagee under the power, which was refused. The only question presented in that case was whether the mortgagor had any equity upon which to base his application for the interference of the court. The case is correctly decided. If the execution of the power was not barred by the statute,

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he was of course not entitled to an injunction; if it was barred and his right to execute the power at an end, the legal title would not pass by the sale. It will be observed that this case was decided prior to the passage of the Act of 1893, Chapter 6, permitting action to be brought to remove a cloud from title. Clark, J., in that case says: "The court will therefore not interpose by an injunction merely to prevent a cloud upon the title."

Hutaff v. Adrian, *supra,* is cited in Smith v. Parker, 131 N. C., 470. No question was involved in that case regarding the Statute of Limitations, nor was it cited for that purpose. Conceding that an action *in personam* upon the note held by Hinton against Overton was barred by the statute, it would not affect the decision of this cause. It is well settled that an action upon the debt may be barred without affecting the right to maintain an action to foreclose the mortgage given to secure it. Capehart v. Dettrick, 91 N. C. 344. This because the bar of the statute affects only the remedy and not the right. Parker v. Grant, 91 N. C., 338; Rouss v. Ditmore, 122 N. C., 775; 19 Am. & Eng. Enc., 146; Sturges v. Crowningshield, 4 Wheat. 206. Hence it is that in an action upon a debt barred by the statute, for the payment of which a "new and continuing promise" is relied upon, the "cause of action" is the original debt, and the new promise is relied upon to repel the bar. Falls v. Sherrill, 19 N. C., 372. In Kull v. Farmer, 78 N. C., 339, the distinction between an action on a debt barred by the statute and one discharged in bankruptcy is pointed out; in the latter "the cause of action" is the new promise, the old debt being a consideration to support the promise. The reason for the distinction is obvious. Prior to the adoption of our Code, there was no statute of limitations in regard to sealed instruments, bonds and mortgages. There was a presumption of payment or satisfaction after the lapse of ten years. Rev. Code, Ch. 65, Sec. 18. This presumption affected the right as distinguished from the remedy. Copeland v. Collins, 122 N. C., 619; Long v. Clegg, 94 N. C., 764. Of course if the debt is paid or satisfied either by actual payment or by presumption of law, the mortgage which is incidental to the debt is likewise discharged and, in equity, the purpose for which the legal title was conveyed being accomplished, would be treated as discharged and the mortgagor, as the owner of the land. Ray v. Pearce, 84 N. C., 485; Edwards v. Tipton, 85 N. C., 480; Simmons v. Ballard, 102 N. C., 109. That such is not the law under our statute of limitations is settled by the uniform and unanimous decisions of this court.

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The question is clearly set forth and discussed in the case of Goldfrank v. Young, 64 Tex., 432, in which Stayton, A. J., said: "In reference to the operation of the statute of limitations in any matter in which the recovery of money is sought, the statute itself limits it

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to 'actions or suits in courts,' and it provides within what time 'actions or suits' in the different classes of cases may be brought, but it does not attempt to determine within what period any one must enforce a right which the debtor has placed it in the power of the creditor to enforce otherwise than by an 'action or suit in court.' * * * The declaration that persons must institute 'suits or actions in courts' within a fixed period to enforce their claims, which can be enforced only in that manner, is not equivalent to declaring that a creditor who has been given by contract a right and means by which he may enforce his claims otherwise than through the courts, shall not enforce it after the time at which he might institute an action or suit, without subjecting himself to the bar which would be urged by a plea of limitation. It is not always true that rights which can not be enforced through the courts are valueless, nor that contracts which the courts can not enforce are invalid." In this case the Supreme Court of Texas held, "That the statute of limitation which applied to a money demand operates upon the remedy when its enforcement is sought by 'suits or actions' in courts. It does not deprive the creditor of a remedy when he had provided by contract, to enforce through a trust deed the payment of his claim."

This case was approved in Fievel v. Zuber, 67 Tex., 275, the court saying: "The statute does not say that no debt shall be collected, but that no action shall be brought. Nor does it provide that the debt shall be extinguished. Any statutes of limitation worded like ours are generally held to operate solely upon the remedy in the courts and not to destroy the debt." Tombler v. Ice Co., 17 Texas Civ App., 596. To the same effect is Hartrauft's Estate, 153 Pa., 540; Slagmaker v. Boyd, 38 Pa., 216; Gardner v. Terry, 99 Mo., 523. In Grant v. Burr, 54 Cal., 298, it is said: "The expiration of the statute time for bringing an action to recover a debt, or to enforce any personal obligation, does not operate as an extinguishment or payment; therefore, where the legal title to land has been conveyed to a trustee to secure a debt, the title and power of the trustee is not affected by the expiration of the period prescribed to bar the debt, and a court of equity will not interfere to enjoin a sale under the deed. The statute of limitations is to be employed as a shield and not as a sword; as a means of defense and not as a weapon of attack."

In Hayes v. Frey, 54 Wis., 503, it is held, "The validity of a sale under a power in a mortgage is not affected by the fact that the statute of limitations had run upon the note secured by the mortgage." Jones on Mortgages, § 1204; Bush v. Cooper, 26 Miss., 599.

* * * * * * *

The point upon which we rest our decision is, that as the mortgagor has expressly put it in the power of the mortgagee to sell

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the land for the payment of the debt and thereby relieved him of the necessity of bringing an action for that purpose, his right is not affected by the statute of limitations, which applies only to actions brought for the enforcement of rights. The legislature may, if in its wisdom it should see fit, place the execution of the power of sale, in respect to the time within which it must be exercised, upon the same footing as actions to foreclose a mortgage with power of sale; but we can not, in the absence of any legislative declaration, make the law. It is ours simply to declare it.

This opinion does not overrule or question Hutaff v. Adrian, *supra,* in respect to the point decided in that case, to-wit, that the plaintiff was not entitled to injunctive relief. In so far as it is said that after the expiration of ten years the mortgage is dead, the right is destroyed we can not concur.

The judgment of the court below is affirmed.[28]

[Clark, C. J. and Douglas, J., delivered dissenting opinions.]

EDITORIAL NOTE—FORECLOSURE BY SCIRE FACIAS.—The usual method of foreclosure in Pennsylvania, and a permissible method in a few other states, is that by scire facias. This is a proceeding in a court of law, leading to a judicial sale of the mortgaged land which conveys to the purchaser the title which the mortgagor had

[28] Compare, Hill v. Gregory, 64 Ark. 317; Emory v. Keighan, 88 Ill. 482; Hebert v. Bulte, 42 Mich. 489; Hall v. Bartlett, 9 Barb. (N. Y.) 297.

In some states the statutes concerning redemption from foreclosure sales are not broad enough to cover both judicial sales and sales under powers. As a matter of legislative policy it is apparent that the right of redemption is more needed in the latter case than in the former.

A court of equity may interpose by injunction to prevent or regulate the exercise of a power of sale. But, in the absence of such judicial interference, the mortgagee or trustee, as in any case of remedy by act of the party, controls the whole proceeding in respect to all those features which in the case of a foreclosure by suit are regulated by the court: e. g. the notice of sale, the time and place of sale, the manner of sale, the distribution of the proceeds &c. Of course, any departure from the requirements of the law and the contract will either invalidate the sale, or render the mortgagee or trustee liable to account or to pay damages, or both, and all matters concerning the conduct of the sale are, of course, open to judicial investigation in any case to which they are material.

The recovery by the mortgagee of any deficiency of the mortgage debt remaining after the sale, and the recovery by the purchaser of possession of the land, matters which in the foreclosure by equitable suit are usually disposed of as incidents of the suit, are, in the case of foreclosure by sale, the subject of common actions at law.

The chief disadvantage, from the point of view of the mortgagee and the purchaser, of the sale under a power, as compared with the foreclosure by suit, lies in the fact that, by the former, nothing is adjudicated, either as to the status of the mortgage as against the mortgagor or other claimants of an interest in the land, or as to the validity of the foreclosure proceedings.

For a digest of the statutes and equitable principles governing sales under powers, see Jones, Mortgages, chaps. 39, 40.

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at the time of executing the mortgage, free from the claims of all subsequent purchasers and encumbrancers. It is obvious that the proceeding closely resembles the ordinary equitable foreclosure. But the only necessary party is the mortgagor, or his executor or administrator. Subsequent purchasers and encumbrancers need not be made parties in order to cut off their equity of redemption. Mevey's Appeal, 4 Pa. St. 80; Hartman v. Ogborn, 54 Pa. St. 120; Chickering v. Failes, 26 Ill. 507; Dennison v. Allen, 4 Ohio 495. In this respect the foreclosure by scire facias obviously resembles the foreclosure by sale under a power, rather than that by equitable suit.

For a discussion of the procedure by scire facias in the several states in which it is permitted, see Jones, Mortgages, §§ 1328, 1333, 1350, 1355.

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CHAPTER VIII.

INJUNCTION AND ACCOUNT.

MORIARTY v. ASHWORTH.

SUPREME COURT OF MINNESOTA, 1890.
43 Minn. 1.

DICKINSON, J. This is an action to restrain the defendant from quarrying and disposing of granite rock from land mortgaged by the defendant to the plaintiff, in April, 1887, to secure a debt of $1,000, to become due two years after that time. The land is of the area of four acres. Its principal value is in the granite quarry thereon. The removal of this material depreciates the value of the land to the extent of such removal; but the quarrying by the defendant has not been carried on to such an extent as to so far impair the value of the land as to render it insufficient security for the plaintiff's debt, nor has he threatened to do so. The court, finding the facts to be substantially as above stated, considered that the plaintiff was not entitled to an injunction. On this appeal we are only to consider whether, upon the facts found the legal conclusion of the court was right.

While some authority may be found in support of the claim of the appellant that a mortgagee is entitled to an injunction restraining any acts of waste by a mortgagor in possession which may diminish the value of the mortgaged property, yet the great weight of authority, both in England and in this country, is to the effect that equity will not interfere in such cases unless the acts complained of are such as may render the security insufficient for the satisfaction of the debt, or of doubtful efficiency. King v. Smith, 2 Hare, 239; Humphreys v. Harrison, 1 Jac. & W. 581; Hippesley v. Spencer, 5 Madd. 422; Harper v. Aplin, 54 Law T. (N. S.) 383; Coker v. Whitlock, 54 Ala. 180; Scott v. Wharton, 2 Hen. & M. (Va.) 25; Buckout v. Swift, 27 Cal. 433; Vanderslice v. Knapp, 20 Kan. 647; Harris v. Bannon, 78 Ky. 568; Van Wyck v. Alliger, 6 Barb. 507, 511; Snell, Eq. 304; 1 Wats. Comp. Eq. 746; 2 Story, Eq. Jur. Par. 915; High, Inj. (2d Ed.) Pars. 693, 694; Bisp. Eq. (4th Ed.) Par. 433; 1 Jones, Mortg. (4th Ed.) Par. 684; 1 Lead. Cas. Eq. (4th Am. Ed.) 992, 1021; Kerr, Inj. (2d Amer. Ed.) 84. In numerous other cases we find that the

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courts, in stating the grounds upon which equity will interfere, seem to regard it as a necessary condition that the sufficiency of the security be threatened. See Cooper v. Davis, 15 Conn. 556; Gray v. Baldwin, 8 Blackf. 164; Hastings v. Perry, 20 Vt. 272; Fairbank v. Cudworth, 33 Wis. 358. From the proposition which we have stated as an established principle of equity, it is not to be understood that equity will not interfere unless the acts threatened are such as may reduce the value of the mortgaged property below the amount of the debt. On the contrary, as was considered in King v. Smith, 2 Hare, 239, we think that the mortgagee is entitled to be protected from acts of waste which would so far impair the value of the property as to render the security of doubtful sufficiency. He is entitled to have the mortgaged property preserved as sufficient security for the payment of his debt, and it is not enough that its value may be barely equal to the debt. That would not ordinarily be deemed sufficient as security to one whose purpose is to secure payment, and not to become a purchaser of the property at its market value. And not only must it be considered that the mortgage is held to secure payment of the debt, and not for the purpose of converting the mortgagee into a purchaser, but that if the debt is not yet mature it is to be considered whether, during the time which may elapse before maturity, the present value of the property may not become depreciated from causes not now known. It does not appear that the court in this case failed to regard these considerations.[1]

Judgment affirmed.

EAKIN, J., in HUGHES v. JOHNSON, 38 Ark. 285, 296 (1881).

It is further, a well settled principle in equity, that one who has an interest in a security may advance what is fairly necessary to its preservation, and may retain the advances out of the proceeds before crediting any portion of his debt. There can at least be no doubt of that, where such advances are made by the consent of all parties interested in the property or fund. That was a strong element in the case of Bell v. Radcliff, (*supra*). This is not upon the idea that the security of the mortgage is thereby extended to other advances, but rather upon the consideration that the proceeds of the property have been diminished by the expenses of preservation.

It remains, by way of preliminary remark, to allude again to the fact that the money, concerning which the questions of application arise, was the fruit of the mortgaged property. Although, as has been said, all parties might agree to have it applied to the unsecured items, yet as that is a diversion from the original intention, the *onus* of showing such agreement is upon the party claiming it.

[1] Compare, Morse v. Whitcher, 64 N. H. 590; Youle v. Richards, 1 N. J. Eq. 534.

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In the light of these principles the finding of the facts by the chancellor, and the decree as to the law, must be reviewed.

The cause was heard alone upon the pleadings, and the depositions of the parties, Bell, Moss and Hughes. The decree recited, as its basis, the execution of the mortgage upon the land and the crop of 1876, and that it was to enable the mortgagor to raise a crop, and its assignment to complainant on the twenty-seventh of June, 1876. That Moss & Bell continued to furnish the supplies required by the mortgage; that on the first of November, 1876, the full amount of supplies named in the mortgage not being sufficient to complete the crop and gather it, the mortgagees furnished additional supplies at Hughes' request; that on the first of January, 1877, they amounted to $1,953, and had been necessary to gather and protect the property from loss. Further that the crop had not been delivered and sold until the first of January, 1877; that it was after that date argeed that Hughes should continue to purchase goods on account, and that the cotton received should be applied first to the payment of said account, and the balance to the credit of the mortgage account; and that Moss & Bell did so apply the cotton received after the first of January. Further: That the goods furnished up to the fifth of March, 1877, were so paid for by cotton received and sold up to that time, leaving, by this mode of statement, then due upon the mortgage of principal and interest, the sum of $759.30.

For this amount a decree was rendered, with the usual order of sale for foreclosure. As to the items of account after the fifth of March, 1877, the bill was dismissed without prejudice.

If the recitals are sustained by the evidence, the decree was correct, in so far as it holds that the payments might be applied to the advances made after the mortgage was due, and beyond its amount.

[His honor proceeded to examine the evidence and found that the sums advanced in excess of the mortgage prior to January 1, 1877, being cash to hire pickers and to purchase a gin, were properly credited to the mortgagee, but that the later advances were not of this character.]

DAVIS v. WINN.

SUPREME COURT OF MASSACHUSETTS, 1861.
2 Allen (Mass.) 111.

Bill in equity to redeem land from a mortgage, given to the defendant by Moses Cummings, dated April 1, 1840, to secure the sum of $1,000, and interest. Cummings died September 10, 1840,

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and the plaintiff became owner of the equity of redemption by several deeds from his heirs at law.

HOAR, J.

* * * * * * *

The other point presented by the report is equally free from difficulty. The defendant, being in possession of the mortgaged estate under his mortgage, after the death of the mortgagor, was compelled to pay a prior mortgage, in order to protect his title. He had therefore, as against the mortgagor and those claiming under him, a right to indemnify himself for this payment out of the mortgaged estate. But the prior mortgagee discharged his mortgage upon the record, instead of assigning it; and the plaintiff claims to stand in the position of a bona fide purchaser without notice, and contends that he should not be obliged to pay a mortgage which the record showed to be discharged and satisfied, at the time he purchased the equity. There is certainly some force in the reasoning by which this position is supported; but, without intending to give an opinion upon it, we think the facts disclosed by the report render it of no avail. The whole amount which the defendant now asks to be allowed to him is less than the amount of his mortgage and interest, after deducting what was received from the estate of Cummings. The defendant has been charged with a large amount of rents and profits of the estate, which accrued before the plaintiff's title was acquired. If the plaintiff bought, trusting to the record, there was nothing on the record to show that anything should be deducted from the amount due on the defendant's mortgage on account of these rents and profits. Up to the year 1855, they were matter of account with the heirs of Cummings; against whom the right to apply them to reimburse the defendant for the sum paid to redeem the prior mortgage was indisputable. As they were more than sufficient to pay that sum, as no account had been settled by which they were otherwise applied, and as the plaintiff will not, in any event, be called upon to pay more than appeared by the record to be due, it is equitable that they should be so applied now.

The result is, that the plaintiff will have a decree that he may redeem upon paying the amount which the master's report shows to be due upon the mortgage, with interest and costs, subject to an account for rents and profits since the date of the report.

Decree accordingly.[2]

[2] In Miller v. Whittier, 36 Maine 577, the mortgagee was also allowed the expenses of maintaining a suit to redeem a prior mortgage.

See also Harper v. Ely, 70 Ill. 581; Comstock v. Michael, 17 Nebr. 288; Riddle v. Bowman, 27 N. H. 236; Clark v. Smith, 1 N. J. Eq. 122.

Compare, Magilton v. Holbert, 52 Hun (N. Y.) 444; Cason v. Connor, 83 Tex. 26.

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RICE, J., in WILLIAMS v. HILTON, 35 Maine 547, 554 (1853).

Taxes legally assessed upon an estate create a lien thereon, and lay the foundation for a title paramount to that derived by deed or mortgage. They constitute a legal charge upon the estate, not upon the mortgagee. Faure v. Winans, Hopkins, 283. It was the duty of the mortgagor, and those holding under him, to discharge all taxes thus assessed upon the demanded premises, while they withheld the possession from the mortgagee, and in case taxes were assessed in a manner which they deemed illegal, notice of this fact should have been given to the mortgagee, and in case payment was to be resisted he should be indemnified against loss, because it would be unreasonable to subject the mortgagee to the hazard of contesting the legality of a tax title by a suit at law, in which, if the final result should be in favor of the validity of that title, all his rights under his mortgage would be forever lost.

* * * * * * *

This form of action [writ of entry to foreclose a mortgage] as now regulated by statute, approximates very closely to a process in equity, for the foreclosure of mortgaged property, and the rights of the parties in ascertaining the amount for which a conditional judgment shall be rendered, must be determined upon the same principles that would control were the mortgagor to bring his bill in equity to redeem the premises from the mortgagee. In that case the mortgagor would be required to pay not only the sums directly secured by the mortgage, but also such additional sums as the mortgagee had been compelled to pay to protect the estate from forfeiture in consequence of the laches of the mortgagor.

A conditional judgment is to be entered for the amount of the two notes produced in evidence and also for the amount paid for taxes, with interest thereon from the time of payment, with costs for the demandant.[3]

[3] Compare, Fiacre v. Chapman, 32 N. J. Eq. 463; Barthel v. Syverson, 54 Iowa 160.

If the mortgagee, instead of paying the tax or redeeming from a tax sale, himself purchases at a tax sale, this is usually treated as a payment of the tax, so that the mortgagee is entitled to credit for his disbursement in the accounting but can not assert the tax title as such. Moore v. Titman, 44 Ill. 367; Fair v. Brown, 40 Iowa 209; Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113; Woodbury v. Swan, 59 N. H. 22; Hall v. Westcott, 15 R. I. 373; Shepard v. Vincent, 38 Wash. 493. But see, Waterson v. Devoe, 18 Kans. 223; Williams v. Townsend, 31 N. Y. 411. The question is largely controlled by the view which is taken as to whether the mortgagee occupies a quasi-fiduciary relation to the mortgagor, as to which, see also, Chap. VI, note 2.

It is usual to insert in the mortgage a covenant by the mortgagor to pay taxes on the land together with a stipulation that, upon his failure so to do, the mortgagee may pay them and add the amount to the mortgage debt, and such provisions are fully enforcible.

A similar covenant concerning taxes which may be levied on the

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HONORE v. LAMAR INS. CO.

SUPREME COURT OF ILLINOIS, 1869.
51 Ill. 409.

Mr. JUSTICE LAWRENCE delivered the opinion of the Court:

The appellant executed his note to Rutter, Endicott & Whitehouse, for $2,146.50, and deposited with them, as collateral security, 74 barrels of whisky. They effected an insurance on the whisky in the Lamar Fire Insurance Company, appellees herein, at their own expense, and in their own name, and without the authority, or even knowledge, of appellant. The whisky was subsequently destroyed by fire, and the company paid the policy to Rutter, Endicott & Whitehouse, first requiring an assignment of appellant's note. The note was accompanied by a power of attorney to confess a judgment, and the company having caused a judgment to be confessed, the appellant filed a bill to enjoin its collection. On the hearing the circuit court dismissed the bill.

If the insurance had been effected at the request or by the authority of appellant, or at his expense, or under circumstances that would make him chargeable with the premium, we should have no difficulty in holding him entitled to its benefits, by applying the money paid in extinguishment of so much of his debt. But none of these circumstances are presented by this record. The appellant prosecutes his appeal merely upon the ground that, in all cases where a mortgagee insures the mortgaged property, the mortgagor is entitled to the benefits of the policy.

This position is maintainable neither upon principal nor authority. The contract of insurance, it has been often remarked, is one of indemnity merely. Any person having an interest in property may, through an insurance, indemnify himself against loss by fire. Mortgagor and mortgagee have each an insurable interest. The interest of both may be covered in one policy, or each may take out a separate policy. In this case the mortgagees insured at their own cost, without privity with the mortgagor and without his knowledge, and when the company paid the debt due them from the mortgagor, it indemnified them against loss and was entitled to be subrogated to their claim. The mortgagor, having had no connection with the insurance, can not claim its benefit. As the premium was not paid by him or chargeable to him, as he was not

mortgage, or debt secured thereby, is valid, except that it is liable to be treated, for the purpose of applying the usury statute, as an agreement to pay additional interest. To meet this difficulty a proviso may be inserted in the covenant that the mortgagor shall only be liable to pay, in any one year, an amount which, together with the interest reserved, equals the maximum legal rate of interest.

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aware even that an insurance had been effected until after the fire, it is difficult to see how such insurance, even when paid, can affect his liability upon his note. Even the case of King v. The State Mutual Fire Insurance Co., 7 Cush. 10, on which the appellant chiefly relies, holds that in such cases the liability of the mortgagor upon his note remains the same, but that the mortgagee may recover it for his own use, although already paid by the insurance company. Certainly it is much more consonant to every principle of equity to say that the debt may be recovered for the benefit of the insurance company, than that the mortgagee should be twice paid. The doctrine of that case would sanction wager policies, and furnish a dangerous temptation to incendiarism.

That the insurance company is entitled to be subrogated to the claims of the mortgagee, in such a case as the present, is held in Carpenter v. Providence Washington Ins. Co., 16 Pet. 501, Sussex Ins. Co. v. Woodruff, 2 Dutcher, 555, and Aetna Fire Ins. Co. v. Tyler, 16 Wend. 397. In Concord A. M. Ins. Co. v. Woodbury, 45 Maine 452, where the assured had voluntarily assigned his claim to the insurance company upon payment by it, as in the present case, the court held the company entitled to recover. The question of the right to subrogation against the will of the mortgagee, was not presented in that case, nor is it in this, because the assignment was made by the mortgagee upon payment of the loss. The only question strictly presented here is, whether the mortgagor has been discharged from his debt by the payment of the mortgagee's policy, and on this point there is no disagreement among the authorities. The debt is still in existence, and the strong equity of the insurance company has been united to the legal title.

The circuit court committed no error in dismissing the bill.

Decree affirmed.[4]

[4] "Fire underwriters in these days, in this state, are the creatures of statute, and have no rights, save such as the state gives to them. They may agree that they will pay such loss or damage as happens by fire to property. They are limited to this. It was not readily that it was first held that they could agree, with a mortgagee or lienor of property, to reimburse to him the loss caused to him by fire. He is not the owner of it. How, then, can he insure it, was the query. And the effort was not to enlarge the power of the insurer so that it might insure a debt, but to bring the lienor within the scope of that power, so that the property might be insured for his benefit. And it was done by holding that, as his security did depend upon the safety of the property, he had an interest in its preservation, and so had such interest as that he might take out a policy upon it against loss by fire, without meeting the objection that it was a wagering policy. The policy did not, therefore, become one upon the debt, and for indemnification against its loss, but still remained one upon the property and against loss or damage to it. It is, doubtless, true, as is said by Gibson, J., in 17 Pa. St. 253, that in effect it is the debt which is insured.

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STINCHFIELD v. MILLIKEN.

SUPREME COURT OF MAINE, 1880.
71 Maine 567.

Bill in Equity to redeem.

PETERS, J. [After holding that the deed and contract for reconveyance involved in the case amounted to a mortgage and that complainant was entitled to redeem.] It is intimated that the mill has burned down, *pendente lite,* under an insurance obtained by the defendants, and a question may arise, before the master, whether the complainant should have a credit of the net proceeds. If the insurance was obtained on the mortgagees' own account

It is only as an effect, however; an effect resulting from the primary act of insurance of the property which is the security for the debt. It is the interest in the property which gives the right to obtain insurance, and the ownership of the debt, a lien upon the property, creates that interest. The agreement is usually, as it is in fact in this case, for insuring, from loss or damage by fire, the property. The interest of the mortgagee is in the whole property, just as it exists, undamaged by fire at the date of the policy. If that property is consumed in part, though what there be left of it is equal in value to the amount of the mortgage debt, the mortgage interest is affected. It is not so great, or so safe, or so valuable, as it was before. It was for indemnity against this very detriment, this very decrease in value, that the mortgagee sought insurance and paid his premium.

"To say that it is the debt which is insured against loss, is to give to most, if not all, fire insurance companies a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against loss or damage by fire. They are not privileged to guarantee the collection of debts. If they are, they may insure against the insolvency of the debtor. No one will contend this; and, it will be said, it is not by a guaranty of the debt, but an indemnity is given against the loss of the debt by an insurance against the perils to the property by fire. This is but coming to our position; that it is the property which is insured against the loss by fire, and the protection to the debt is the sequence thereof. As the property it is which is insured against loss, it is the loss which occurs to it which the insurer contracts to pay, and for such loss he is to pay within the limit of his liability, irrespective of the value of the property undestroyed. So as to the remark, that it is the capacity of the property to pay the debt which is insured. This is true in a certain sense; but it is as a result and not as a primary undertaking. The undertaking is that the property shall not suffer loss by fire; that is, in effect, that its capacity to pay the mortgaged debt shall not be diminished. When an appreciable loss has occurred to the property from fire, its capacity to pay the mortgaged debt has been affected; it is not so well able to pay the debt which is upon it. The mortgage interest, the insurable interest, is lessened in value, and the mortgagee, the insuree, is affected, and may call upon the insurer to make him as good again as he was when he effected his insurance.

"Another consideration: It is settled that when a mortgagee, or one in like position toward property, is insured thereon at his own expense,

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only, they should not be allowed. Cushing v. Thompson, 34 Maine 496; Pierce v. Faunce, 53 Maine, 351. The head note in Larrabee v. Lumbert, 32 Maine, 97, is erroneous in that respect. It was allowed in that case by consent. Insurance Co. v. Woodbury, 45 Maine, 447.

But where a mortgagee insured the property by the authority of the mortgagor, and charges him with the expense, then any insurance recovered should be accounted for. And if a mortgagor covenants to insure, and fails to do so, the mortgagee can himself insure at the mortgagor's expense.

One of the defendants testifies that "Stinchfield agreed to pay all taxes and insurance." He also says, "We have had the house, stable and mill insured, and have paid the insurance, $108." We think this is evidence of an insurance obtained by the mortgagees at the expense of the mortgagor on account of his failure to keep his verbal covenant to insure, and renders it proper that the net proceeds of any insurance obtained should be allowed in the settlement between them.

But this cannot be, if the insurance was collected under a policy in which it is agreed between the insured and insurer that the company in case of loss should be subrogated to the right of the mortgagee. For in such case the insurance is not in fact on the mortgagor's account, nor is it such an insurance as could be made available to him. Jones, Mort. (2d ed.) § 420, and cases in note.[5]

EDITORIAL NOTE. If the mortgagee takes possession of the

upon his own motion and for his sole benefit, and a loss happens to it, the insurer, on making compensation, is entitled to an assignment of the rights of the insured This is put upon the analogy of the situation of the insurer to that of a surety. If this analogy be made complete, then has the insurer no more right to refuse payment of the loss, so long as the insured has other remedy for his debt, than has the surety. One as well as the other, as soon as the creditor's right to make demand is fixed, must respond to it and seek his reimbursement through his right of subrogation; and, indeed, the application of this equitable right of subrogation makes our view of this subject harmonious and consistent with all the rights and interests of all the parties." Folger, J., in Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 357.

[5] Compare, Fowley v. Palmer, 5 Gray (Mass.) 549; Pendleton v. Elliott, 67 Mich. 496; Waring v. Loder, 53 N. Y. 581; Foster v. Van Reed, 70 N. Y. 19.

It is usual to insert in a mortgage a stipulation that the mortgagor and his assigns will, during the continuance of the mortgage, keep the buildings thereon insured in a stated amount by a policy payable to the mortgagee as his interest may appear, and that upon default in the performance of this covenant the mortgagee may effect such insurance and add the amount of the premiums to the principal of the mortgaged debt.

As to the right of the mortgagee to the benefit of insurance effected by the mortgagor in his own name, see Ames v. Richardson, post.

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mortgaged premises, he will be charged in the accounting either with the rents and profits or with the fair rental value of the property. If he rents the property to tenants, exercising reasonable prudence in the choice of tenants and reasonable diligence in collecting the rent, he will be charged with the rent he actually receives. In other cases he may be charged with the revenue (rents or profits) which he receives, or with that sum plus such sums as it appears that he should receive, but does not, or with the fair rental value of the property; the choice between these several methods of accounting, resting largely in the discretion of the court and depending upon the circumstances of each case, cannot be made the subject of definite rules. See Jones, Mortgages, §§ 1121-1125. The mortgagee in possession will also be charged with waste committed by him, and even for permissive waste in failing to keep the premises in repair if he is guilty of gross negligence in this respect. Wragg v. Denham, 2 Younge & C. 117; Dexter v. Arnold, Fed. Cas. 3858.

The mortgagee in possession will be credited with expenditures for necessary repairs, but not, it is generally said, for improvements, as distinguished from repairs, though they appear to be beneficial to the estate. The rule regarding improvements is rested on the principle that if such credits were allowed the mortgagee might "improve the mortgagor out of his estate." The distinction, however, between repairs and improvements is not always clear, and, even in case of manifest improvements, the rule may be tempered to meet peculiar equities, as where possession has been taken under an invalid foreclosure so that there was reasonable cause for believing the possession to be that of an owner. See Jones, Mortgages, §§ 1126-1129.

Upon the whole, the rules regarding the accounting of the mortgagee in possession are so severe that mortgagees who are well advised will seldom take possession.

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CHAPTER IX.

EXTENT OF THE MORTGAGE LIEN.

McFADDEN v. ALLEN.

COURT OF APPEALS OF NEW YORK, 1892.
134 N. Y. 489.

Action to recover for the alleged conversion of certain structures, machinery and other articles placed upon real estate by plaintiff.

FOLLETT, CH. J. In determining as between mortgagor and mortgagee, whether articles are or are not fixtures, the same rules prevail which are applicable to cases arising between grantors and grantees. (Snedeker v. Warring, 12 N. Y. 170; Gardner v. Finley, 19 Barb. 317; Laflin v. Griffiths, 35 *id.* 58; Robinson v. Preswick, 3 Edw. Ch. 246; Main v. Schwarzwaelder, 4 E. D. Smith, 273; 1 Dart V. and P. (6th ed.) 607; 1 Jones Mort., § 428.) And as between mortgagor and mortgagee the same rules are applicable to articles placed on the mortgaged premises by the mortgagor after the execution of the mortgage. (Gardner v. Finley, 19 Barb. 317; Rice v. Dewey, 54 *id.* 455, 472; Sullivan v. Toole, 26 Hun, 203; Walmsley v. Milne, 7 C. B. (N. S.) 115, 135; Winslow v. Merchants' Ins. Co., 4 Met. 306; Ex parte Belcher, 4 D. & C. 703; Ex parte Reynal, 2 M. D. & De Gex, 443; 1 Jones Mort., Par. 436; 1 Sug. Vendors (7th Am. ed.) 37, note 1; Phoenix Mills v. Miller, 4 N. Y. S. R. 787.) In the case last cited the rule was well stated, as follows: "A mortgagee of real property is entitled to have his lien respected as to all that was realty when he accepted the security; also as to all accession to the realty, save, perhaps, when the accession is made under an agreement with the party that its purchase price or expense shall be secured and is secured by a lien thereon."

The same rules apply to articles annexed to the premises by a subsequent grantee or vendee in possession under an executory contract to purchase. (Eastman v. Foster, 8 Met. 19; Lynde v. Rowe, 12 Allen, 100; Glidden v. Bennett, 43 N. H. 306; Cooper v. Adams, 6 Cush. 87; Ogden v. Stock, 34 Ill. 522; Poor v. Oakman, 104 Mass. 309, 318; 1 Wash. R. P., page 2, par. 4.)

Bearing these general rules in mind, it remains to apply them

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to the particular facts involved in the case at bar, which briefly are as follows: Jeremiah McFadden was the owner in fee of eighteen acres of land, upon which was a mill-pond, saw-mill, dwelling and barn. December 11, 1878, he mortgaged the property to Orson Wallace to secure the payment of $400 five years thereafter, with semi-annual interest, which mortgage was duly recorded September 2, 1879. The plaintiff, a son of Jeremiah McFadden, occupied the premises from December, 1879, until May 21, 1887, when he was ejected by a writ of assistance issued in and in pursuance of a sale made by virtue of a judgment foreclosing said mortgage.

The plaintiff testified that it was orally agreed between himself and his father that the former should take possession of the property, have the use of it, and when he had paid the mortgage he was to have a deed. The son was to make such improvements as he chose, with the right of removing them if he failed to pay the mortgage and acquire the property. Under this contract the son occupied the property for nearly eight years, and added to it some new buildings and machinery. Under this contract the plaintiff became the equitable owner of eighteen acres, and on paying the mortgage could have compelled a conveyance of the legal title by his father. (Freeman v. Freeman, 43 N. Y. 34.) The plaintiff could have devised the land, and, had he died intestate, his interest held under this oral contract would have descended to his heirs subject to the dower right of his widow. (Cogswell v. Cogswell, 2 Edw. Ch. 231-239; Griffith v. Beecher, 10 Barb. 432; Warren v. Fenn, 28 *id.* 333; Dayton's Surrogate (3d ed.), 630.) While in possession of the eighteen acres under this arrangement with the father, the plaintiff and his father, with their wives, executed a mortgage on the eighteen acres and another parcel of thirty-seven acres June 16, 1885, to secure $634.26 to Frances L. and Anna M. Harrison, who were made defendants in the action to foreclose the first mortgage, and they became the purchasers at the sale and afterward conveyed to the defendant. It is not asserted that Wallace, the first mortgagee, or the Misses Harrison had notice, actual or constructive, of the alleged contract between the father and the son. The son, by the execution of the mortgage, treated the eighteen acres as his own, and the buildings and the machinery as par of it, and he cannot now be permitted to assert as against the Misses Harrison or the defendant, their grantee, that the buildings and machinery were not fixtures.

The plaintiff, his wife, Jeremiah McFadden, his wife, Frances L. Harrison and Anna M. Harrison were defendants in the action brought by Orson Wallace to foreclose his mortgage, and were personally served with the summons and complaint in that action.

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The complaint contained this allegation: "The plaintiff further shows, upon information and belief, that Alexander McFadden, Lunetta McFadden, Francis L. Harrison, Anna M. Harrison and Truman Jones have, or claim to have, some interest in or lien upon said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said mortgagee."

None of said defendants appeared in the action and a judgment of foreclosure was recovered by default, pursuant to which the sale before mentioned was made, and the writ of assistance was issued.

The plaintiff's rights in the eighteen acres were subsequent in time to the mortgage given to and foreclosed by Wallace, which was alleged to be a lien on the property, prior in law and equity to the rights of the plaintiff in this, and the defendant in the foreclosure action. If the plaintiff intended to assert title to the fixtures he was bound to do it in that action and he could not lie by until a judgment has been entered declaring his rights inferior to the mortgage, and then assert as against the purchaser under the judgment or his grantee that his claim to the buildings and machinery was prior to the lien of the mortgage. On the trial of this action, the plaintiff testified that July 7, 1886, he "stated in writing to the Ames Engine Manufacturing Co. for the purpose of obtaining credit that he owned in fee the fifty-five acres of land covered by said two mortgages, and that March 3, 1887, he wrote to the agents of the Misses Harrison (the second mortgagees) that he had paid his father for the eighteen acres and held a deed thereof subject to the mortgage.

This statement was made for the purpose of obtaining a further loan from them. This evidence is entirely inconsistent with the plaintiff's present claim that he was merely the occupant of the premises, with the right to remove betterments, instead of the equitable owner with the right to have the legal title upon the payment of the Wallace mortgage; the plaintiff testified that he was not a tenant of his father, and paid no rent. His position was that of a beneficial owner, subject to the mortgage, and all improvements which he made upon the property were subject to the rules of law applicable to mortgagors and mortgagees.

* * * * * * *

The judgment should be affirmed with costs.

BRADLEY, J. The mortgage, through the foreclosure of which the defendants derived their title, was prior to the agreement between the mortgagor and the plaintiff. The title taken by the foreclosure vested by relation as of the time mortgage was made. (Rector, etc., v. Mack, 93 N. Y. 488; Batterman v. Albright, 122

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id. 484.) It does not appear that the mortgagee in any manner assented to such agreement.

In Sheldon v. Edwards (35 N. Y. 279) the arrangement that the property there in question should be treated as personal was made between the mortgagor and mortgagee.

In Tifft v. Horton (55 N. Y. 377) there was a stipulation of the mortgagee made before the sale that the legal rights of the plaintiff should not be changed by the foreclosure sale.

In Globe M. M. Co. v. Quinn (76 N. Y. 23) the plaintiff was assignee of lease of the premises made prior to the mortgage, and in Tyson v. Post (108 N. Y. 217) the mortgagee was a party to the agreement that the property in controversy there should remain personal.

I concur in affirmance.

Brown and Vann, JJ., concur with Follett, Ch. J.; Haight, J., concurs with Bradley, J.; Parker, J., dissents, and Landon, J., does not sit.

Judgment affirmed.[1]

PARTRIDGE v. HEMENWAY.

SUPREME COURT OF MICHIGAN, 1891.
89 Mich. 454.

LONG, J. This bill was filed to foreclose a mortgage given by Hiram F. Hemenway and wife. At the time the mortgage was executed upon lots 9 and 10, some buildings were situated thereon, which were thereafter removed. The testimony abundantly shows that the two lots were only of the value of about $50 at the time the mortgage was given, aside from the buildings, and are worth no more now. No question is raised but that J. F. Partridge & Bro. paid full value for the mortgage, $400, and that it was assigned to the complainant for value. At the time she took it the property was not of greater value than the mortgage. No showing is made that she ever consented to the removal of the buildings from these lots, and she denies ever hearing that Hemenway contemplated removing them. The first she heard of the

[1] Difficult questions arise when articles which have been affixed to mortgaged land by the owner, either before or after the execution of the mortgage, were, at the time of their annexation, mortgaged to a third person or subject to a conditional sale agreement, reserving the title in a third person for security. The problem develops into many distinctions and much difference of authority. As it is usually, and properly, treated in connecttion with the general topic of Fixtures, the student is here merely referred, for a summary of the subject, to the article on Fixtures by Nathan Abbott, in 19 Cyc. 1033, 1048-1055.

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removal was after they had been removed and placed on lot 2, which defendant Hartwell thereafter purchased. The contract entered into by J. F. Partridge & Bro., set out in the opinion of my Brother Morse, was to reduce the amount of the principal in the mortgage on condition that certain monthly payments were made. This was not kept by Hemenway. I am unable to see how this contract should be construed as an assent on complainant's part to the removal of the buildings. Nothing of the kind is said in the contract, and, if there were, the contract was not performed by Hemenway. I am satisfied from the testimony and the surrounding circumstances that Mr. J. F. Partridge never consented to the removal of these buildings. He testifies that he never consented thereto, and it is impossible to believe that he would waive complainant's right to a lien upon the buildings while nearly $400 yet remained due upon the mortgage, and accept the two lots valued at $50 in lieu thereof.

The case is then presented whether the bona fide assignee of the mortgage shall lose her lien by the removal of these buildings upon a lot, the title to which was afterwards acquired by defendant Hartwell by a quitclaim deed. No one would claim, if the fact be established, which I think is established, that the complainant or J. F. Partridge & Bro. never consented to the removal of the buildings, and that Hemenway removed them without the knowledge or consent of these parties, that the complainant would lose her lien under the mortgage. Hemenway, the mortgagor, could not set up this claim, and Hartwell under his quitclaim deed stands in no better position.

The case is a peculiar one. It is contended that this is a litigation of the title to the property, which cannot be done in the foreclosure proceedings. The case of Summers v. Bromley, 28 Mich. 125, is cited. I do not think the case falls within the principles laid down in that case. The buildings were covered by the lien of the mortgage before they were removed. This is not disputed. The defendant Hartwell was made a party defendant by reason of his claim as subsequent purchaser or incumbrancer.

The court below decreed that the buildings were still incumbered by the mortgage, and I think correctly so held; and that they be sold if the lots did not bring enough to satisfy the mortgage.

The decree must be affirmed.

Champlin, C. J., McGrath and Grant, JJ., concurred.

[Morse, J., dissented, on the ground that the question could not be adjudicated in a foreclosure suit, at least upon the allegations of this bill, and on the further ground that the defendant's claim of assent to the removal was established by the evidence.]

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VERNER v. BETZ.

COURT OF ERRORS OF NEW JERSEY, 1889.
46 N. J. Eq. 256.

On this bill to foreclose and the answers and proofs, the question arises whether or not the complainant has any remedy against a dwelling-house which was removed without the consent of the mortgagee from the premises, included and described in his mortgage, after the execution of the mortgage, to another lot of land near by, which, after such removal, was purchased and owned by the defendant, the mortgagor, and then sold by him to the defendant Verner. The land upon which the house was so erected, and which is described in the mortgage, was a lot of twenty feet in width, and, without the building, is not worth over $250, but with the dwelling-house upon it, was worth about the amount of the mortgage, $1,500.

SCUDDER, J.

* * * * * * *

Assuming that the appellant, Verner, bought the house and paid for it a valuable consideration, without knowledge of its removal, as appears by the direct proof; and that Muench sold it, as he testifies, to raise money to pay for the hall building and the improvements he was making, the important question is presented, whether the complainant is in a position to obtain the relief he asks here for the injury he has sustained.

Can a court of equity return to the wasted property the building that has been wrongfully removed, and sold to a bona fide purchaser, after being affixed to other land not included in the mortgage?

The subject of legal and equitable relief, where such removals are made, is considered by Mr. Jones in his book on Mortgages, Pars. 143, 144, 453, 684, with abstracts from cases and numerous citations in the notes. It is a question on which the authorities are divided, and depends for its solution on the effect given to a mortgage of lands.

It seems that where the mortgage is regarded as a conveyance of the legal title to the property, giving the mortgagee the right of possession, there his legal ownership and actual, or constructive, possession, give him the right to follow and recover the property severed. The principle applied is, that property severed from the realty, so as to become a chattel, belongs to the legal owner of the land. But where the mortgage is regarded merely as a lien for security and the mortgagor has the right of possession until ejectment, or foreclosure, there the mortgagee has merely the right to restrain the re-

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moval of the property by injunction, to protect his lien; or, after the removal, a right to recover damages for the wrongful diminution of his security.

* * * * * * *

In our state the title of the mortgagee to lands under his mortgage has been defined by this court in Shields v. Lozier, 5 Vr. 496, 503, where it is said, that the mortgage is regarded, not as a common-law conveyance, on condition, but as a security for debt, the legal estate being considered as subsisting only for that purpose. This is elsewhere called the equitable and the American doctrine by which the mortgagor has a right to lease, sell and in every respect deal with mortgaged premises as owner, so long as he is permitted to remain in possession and so long as it is understood and held, that any person taking under him takes subject to all the rights of the mortgagee. 4 Kent Com. 157.

There is no difficulty in applying this rule while fixtures remain attached to the realty, and so long as the mortgagor continues in possession; or when the property severed passes into the possession of a person in collusion with him to defeat the lien and security of the mortgagee, whether upon or off the mortgaged premises, it would seem that the rights of the mortgagee would be unaffected. But when the property is severed and sold by a mortgagor in possession, having the legal title, to an innocent purchaser, the lien in equity is gone, and the remedy of the mortgagee is by an action at law against the mortgagor and those who act with him to impair or defeat the security of the mortgage.

The case of Kircher v. Schalk, 10 Vr. 335, holds, that a mortgagee of real estate, whose debt is due, but who had not entered into possession, can not maintain replevin for a steam-engine affixed to the realty subject to the mortgage, which the mortgagor or his assigns had severed from the realty and removed from the premises, because the mortgagee can not, with propriety, insist upon being legally entitled to a remedy the enforcement of which pertains to the general legal ownership of the land. But in Jackson v. Turrell, 10 Vr. 329, it was decided that a mortgagee may maintain an action on the case against the mortgagor, or his assigns, for an injury to the security resulting from the removal of fixtures, or other waste by the defendant. Notice, without fraud, was said to be sufficient to charge the purchaser with liability.

It is not necessary in this case to determine whether a court of law will enforce this remedy against a bona fide purchaser without actual notice, or the exact form of remedy that may be there used; but in a court of equity the right of such purchaser is equal to the equity of a mortgagee who has not such title to the article severed that he can maintain an action for the recovery, in specie, of the fixture removed.

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It is a maxim, that where there is equal equity the law must prevail. It is upon this account that a court of equity constantly refuses to interfere, either for relief or discovery, against a bona fide purchaser of the legal estate, for a valuable consideration, without notice of the adverse title, if he chooses to avail himself of the defense at the proper time and in the proper mode. 1 Story Eq. Jur., Par. 64 c.

The conclusion given in 2 Pom. Eq. Jur. Par. 743 on this matter is, that wherever one or the other of the parties has a legal estate over which a court of law can exercise jurisdiction, then, in an equity suit between them, as a general rule, the defense of a bona fide purchaser for valuable consideration will avail as against the plaintiff, whether he has a legal or an equitable estate; in either case the court of equity simply withholds its hand and remits the party to a court of law.

In the review of cases which appear to conflict with the conclusion in this case, cited from the English courts, it must be borne in mind that there the mortgagee has the legal title to the mortgaged land, and the right of possession.

Having found that the appellant, Verner, is a bona fide purchaser of the building in controversy, affixed to his land, according to the weight of the evidence, as presented, the decree will be reversed and modified so that the land described in the mortgage with the building and improvements thereon, as they existed at the time of filing the bill, shall be sold to satisfy the mortgage; and as to the injury sustained by the removal of the building formerly on the land, the mortgagor will be remitted to his remedy at law.

For affirmance—None.

For reversal—The Chief-Justice, Dixon, Garrison, Knapp, Magie, Van Syckel, Brown, Clement, Cole, McGregor, Smith, Whitaker—12.

JOHNSON v. BRATTON.

SUPREME COURT OF MICHIGAN, 1897.
112 Mich. 319.

MOORE, J. This is a proceeding to foreclose a mortgage dated November 2, 1876, given by David Bratton to complainant Wheeler. * * * The Wheeler mortgage was put upon record soon after it was given. May 10, 1880, Bratton sold the premises to Sidney Case, and he sold to defendant Lizzie Johnson, April 13, 1881. When the Wheeler mortgage was given, there was a large two-story building on the land described in the mortgage, which constituted the chief value of the property; the value of the lot alone

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not exceeding $300. After Mrs. Johnson got the property, she moved the building to another piece of ground owned by her. October 17, 1881, Mrs. Johnson gave a mortgage upon the lot to which she had moved the building to one Robinson. After the foreclosure proceedings were commenced, Robinson was made a party.

* * * * * * *

It is said to be error not to subject the building to the lien of the Wheeler mortgage; and counsel cite Turner v. Mebane, 110 N. C. 413, and Partridge v. Hemenway, 89 Mich. 454, and we think these cases are in point. The Wheeler mortgage was upon record when Mrs. Johnson obtained title to the land, in 1881. It was her duty to take notice of the lien created by it. We can not subscribe to the doctrine that a lien created by a mortgage upon buildings attached to the freehold in such a way as to make them part of the real estate can be defeated by removing the buildings to another piece of real estate.

It may be urged that, as Mr. Robinson had no knowledge of the existence of the Wheeler mortgage when he took his mortgage, his mortgage should be a prior lien. We understand the rule to be that when the equities of parties are equal, and neither has the legal title, the prior equity will prevail. Wing v. McDowell, Walk. Ch. 175; Norris v. Showerman, *id.* 206. Applying these doctrines to this case, we think the Wheeler mortgage is the prior equity, and must first be satisfied. The proofs show that the land covered by the mortgage and the building removed from that land are valuable enough to pay both mortgages. The land covered by the Wheeler mortgage should first be sold, and, if enough money is not realized from that sale to pay the Wheeler mortgage, the building should then be sold, and from the proceeds the balance of the Wheeler mortgage be first paid, and the surplus, so far as necessary, be applied to the payment of the Robinson mortgage.

The decree of the court below will be modified as here suggested, and affirmed, with costs to the complainants.

The other Justices concurred.[2]

TEAL v. WALKER.

SUPREME COURT OF THE UNITED STATES, 1883.
111 U. S. 242.

On August 19th, 1874, Bernard Goldsmith borrowed of James

[2] See also, Buckout v. Swift, 27 Cal. 433; Harris v. Bannon, 78 Ky. 568; Hamlin v. Parsons, 12 Minn. 108.
Compare, cases in Chap. III, § 2.

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D. Walker the sum of $100,000, and gave to the latter his note, dated Portland, Oregon, August 19th, 1874, for the payment to Walker or his order, two years after date, of the sum borrowed, with interest payable monthly at the rate of one per cent. per month from date until paid. Goldsmith, at the time the note was executed, was the owner in fee of certain lands in the State of Oregon and in the Territory of Washington, and he and Joseph Teal were the joint owners and tenants in common of certain other lands in Oregon. On August 19th, 1874, Goldsmith conveyed to one Henry Hewett, by four several deeds, absolute on their face, the lands in Oregon and in Washington Territory of which he was the sole owner, and on the same day he and Teal executed and delivered, to the same grantee, three several deeds, absolute on their face, for the lands which they jointly owned as tenants in common, one being for lands in Linn County, another for contiguous lands in Polk and Benton Counties, and the third for lands in Clackamas County, all in the State of Oregon. These deeds were intended as a security for the above-mentioned note, as appeared by a defeasance in writing, executed on the same day as the note by Goldsmith, Teal, Hewett and Walker. This instrument, after reciting the execution of the note above mentioned, declared that Hewett held the legal title to the lands conveyed to him as aforesaid, in trust and for the uses therein described. It then declared as follows: "Subject to the legal title of Hewett, Teal and Goldsmith, or Goldsmith alone shall (1) retain possession of the lands, and take and have, without account the issues and profits thereof—they paying all taxes and public charges imposed thereon—until said note should become due and remain unpaid thirty days; (2) that if such default is made in the payment of said note, Goldsmith and Teal 'will and shall, on demand, peacefully surrender to Hewett' the possession of said property, who 'may and shall proceed and take possession' of the same, 'and on thirty days' notice in writing to Teal and Goldsmith requiring them to pay said debt, and on their failure so to pay, shall sell the same at public auction on not more than thirty days' notice,' or sufficient thereof to pay the debt and charges."

Interest was paid on the note made by Goldsmith to the plaintiff up to January 21st, 1877, but none after that date. In April, 1877, Goldsmith conveyed to Teal all his estate in the lands which he had conveyed in trust to Hewett by the deeds of August 19th, 1874, and put Teal in possession thereof.

On July 6th, 1877, the interest on the note being in arrear since January 21st preceding, Hewett demanded of Teal the possession of all the property conveyed by said deeds. He refused to yield possession, and held the lots in the city of Portland until Novem-

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ber 30th, 1878, and the farm lands until some time in the same month and year.

Walker, by reason of Hewett's refusal to surrender possession of the property conveyed in trust to Hewett, was compelled to and did bring suit to enforce the sale of the property. All the property was sold, either in accordance with the terms of the defeasances above mentioned or by order of court, and the proceeds of the sale fell far short of paying the note, leaving a balance due thereon of more than $50,000 which Goldsmith had no means to pay.

This action was brought by Walker, the payee of the note, against Teal, to recover the damages which he claimed he had sustained by the refusal of Teal to surrender possession of the property of which Goldsmith had been the owner, or which he had owned jointly with Teal, and which had been conveyed to Hewett in trust as aforesaid. The complaint recited the facts above stated, and averred that by reason of the refusal of Teal to surrender possession of the property to Hewett, Walker had been damaged in the sum of $16,000, for which sum the complainants demanded judgment.

Teal filed a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled.

WOODS, J.

* * * * * * *

We believe that the rule is without exception that the mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession. In the case of MOSS v. GALLIMORE, 1 Doug. 279, Lord Mansfield held that a mortgagee, after giving notice of his mortgage to a tenant in possession holding under a lease older than the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to that which accrues afterwards. This ruling has been justified on the ground that the mortgagor, having conveyed his estate to the mortgagee, the tenants of the former became the tenants of the latter, which enabled him, by giving notice to them of his mortgage, to place himself to every intent in the same situation towards them as the mortgagor previously occupied. Rawson v. Eicke, 7 Ad. & El. 451; Burrowes v. Gradin, 1 Dowl. & Lowndes, 213.

Where, however, the lease is subsequent to the mortgage, the rule is well settled in this country, that, as no reversion vests in the mortgagee, and no privity of estate or contract is created between him and the lessee, he can not proceed, either by distress or action, for the recovery of the rent. Mayo v. Shattuck, 14 Pick. 533; Watts v. Coffin, 11 Johns. 495; McKircher v. Hawley, 16 *Id.*

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289; Sanderson v. Price, 1 Zabr. 637; Price v. Smith, 1 Green's Ch. (N. J.) 516.

The case of Moss v. Gallimore has never been held to apply to a mortgagor or the vendee of his equity of redemption. Lord Mansfield himself, in the case of Chinnery v. Blackman, 3 Doug. 391, held that until the mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profits made.

The rule on this subject is thus stated in Bacon's Abridgment, Title Mortgage C: "Although the mortgagee may assume possession by ejectment at his pleasure, and, according to the case of Moss v. Gallimore, Doug. 279, may give notice to the tenants to pay him the rent due at the time of the notice, yet, if he suffers the mortgagor to remain in possession or in receipt of the rents, it is a privilege belonging to his estate that he can not be called upon to account for the rents and profits to the mortgagee, even although the security be insufficient."

So, in Higgins v. York Buildings Company, 2 Atk. 107, it was said by Lord Hardwicke: "In case of a mortgagee, where a mortgagor is left in possession, upon a bill brought by the mortgagee for an account in this court, he never can have a decree for an account of rents and profits from the mortgagor for any of the years back during the possession of the mortgagor," and the same judge said in the case of Mead v. Lord Orrery, 3 Atk. 244: "As to the mortgagor, I do not know of any instance where he keeps in possession that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into possession."

In Wilson, ex parte, 2 Ves. & B. 252, Lord Eldon said: "Admitting the decision in Moss v. Gallimore to be sound law, I have been often surprised by the statement that a mortgagor was receiving the rents for the mortgagee * * * . In the instance of a bill filed to put a term out of the way, which may be represented as in the nature of an equitable ejectment, the court will, in some cases, give an account of the past rents. There is not an instance that a mortgagee has *per directum* called upon the mortgagor to account for the rents. The consequence is, that the mortgagor does not receive the rents for the mortgagee." See, also, Coleman v. Duke of St. Albans, 3 Ves. Jr. 25; Gresley v. Adderly, 1 Swanst. 573.

The American cases sustain the rule that so long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate; and, although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right, he can not claim the rents; if he wishes to receive the rents, he must take means to obtain the possession. Wilder v. Houghton,

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1 Pick. 87; Boston Bank v. Reed, 8 Pick. 459; Noyes v. Rich, 52 Me. 115.

The case against the right of the defendant in error to recover in this case the rents and profits received by the owner of the equity of redemption is strengthened by section 323, chapter 4, title 1, General Laws of Oregon, 1843-1872, which declares that "a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law."

This provision of the statute cuts up by the roots the doctrine of Moss v. Gallimore, *ubi supra,* and gives effect to the view of the American courts of equity that a mortgage is a mere security for a debt, and establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure. For if a mortgage is not a conveyance, and the mortgagee is not entitled to possession, his claim to the rents is without support. This is recognized by the Supreme Court of Oregon as the effect of a mortgage in that State. In Besser v. Hawthorn, 3 Oregon, 129 at 133, it was declared: "Our system has so changed this class of contracts that the mortgagor retains the right of possession and the legal title." See, also, Anderson v. Baxter, 4 Oregon, 105; Roberts v. Sutherlin, *id.* 219.

The case of the defendant in error can not be aided by the stipulation in the defeasance of August 19th, 1874, exacted by the mortgagee, that Goldsmith and Teal would, upon default in the payment of the note secured by the mortgage, deliver to Hewett, the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and, although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the State, it can not be enforced. Railroad Company v. Lockwood, 17 Wall. 357; Bank of Kentucky v. Adams Express Company, 93 U. S. 174; Marshall v. Baltimore & Ohio Railroad Company, 16 How. 314; Mequire v. Corwine, 101 U. S. 108.

In any view of the case, we are of opinion that defendant in error was not entitled to receive the rents sued for in this action. As this conclusion takes away the foundation of the suit, it is unnecessary to notice other assignments of error.

The judgment of the Circuit Court is reversed, and the cause remanded to that court for further proceedings in conformity with this opinion.[3]

[3] Compare, Hazeltine v. Granger, supra.

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NOYES v. RICH.

SUPREME COURT OF MAINE, 1861.
52 Maine 115.

DAVIS, J.—In the suit in equity of Mason & als. v. Y. & C. Railroad Co. & als., ante p. 80, the plaintiff was appointed a receiver, and was ordered to take certain property of the corporation into his possession. The defendant had possession at the time, as superintendent of the railroad; and he also had money in his hands amounting to about seven hundred dollars, which had accrued by operating the road. This he refused to deliver to the receiver; and this suit is brought to recover it.

In a suit in equity, in its nature *in rem*, when a receiver is appointed, the right to the custody of the property in controversy vests in him immediately upon the filing of his bond. Albany Bank v. Schermerhorn, 1 Clark's Ch., 297. And he may, by order of Court, bring a suit for it in his own name. Green v. Bostwick, 1 Sandf. Ch., 185.

But this right of custody extends only to the property which is the subject-matter of the litigation. Under a general creditor's bill, to recover the entire property of a debtor, the receiver is entitled to the whole of such property. Chipman v. Sabbaton, 7 Paige, 47. So assignees in bankruptcy, or insolvency, take the whole estate. So would receivers of banks, under our statute, have the right to the custody of the entire corporate property, of whatever kind.

The suit of Mason and others is not a general creditor's bill, though analogous to one. They bring it, not in behalf of all the creditors of the corporation, but in behalf of certain specified creditors. Nor does it seek to reach all the property of the corporation, but certain specified property, mortgaged in trust for their benefit, by a deed to Myers, dated February 6, 1851. The right of the plaintiffs can not extend beyond the property mortgaged; and the right of the receiver must necessarily have the same limitation.

There are certain defendants in the equity suit, trustees under a subsequent mortgage, who have other conveyances from the railroad company. Whether they can hold the money in the hands of the defendant, in any adjustment or controversy with him, it is immaterial now to inquire.

The mortgage, of which Mason and others claim the benefit, was afterwards assigned by Myers, by his deed to the trustees referred to, and to other parties who also deeded to said trustees. But the assignees did not take possession of the railroad, under the mortgage, for condition broken. Smith and Myers undertook

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to take possession; but it was after the mortgage had been assigned, and so no rights were affected by it.

It will hardly be contended that, while mortgagors remain in possession, they can be compelled to pay the rents and profits of the property to the mortgagees. Boston Bank v. Reed, 8 Pick., 459; Mayo v. Fletcher, 14 Pick., 525. And yet, that is just what is attempted in the case at bar. No one had ever rightfully taken possession under the mortgage, until it was done by the receiver, in March, 1860. The money in the defendant's hands accrued from the earnings of the road prior to that time. The mortgage did not attach to it. Therefore it was not embraced in the subject-matter of the suit in equity; and the receiver was not entitled to it.

Plaintiff nonsuit.

NEW YORK SECURITY &c. CO. v. SARATOGA GAS &c. CO.

COURT OF APPEALS OF NEW YORK, 1899.
159 N. Y. 137.

O'BRIEN, J.

* * * * * * *

On the first day of February, 1887, the Saratoga Gas and Electric Light Company, a domestic corporation, executed and delivered to the American Loan and Trust Company a mortgage to secure its bonds, amounting in the aggregate to three hundred thousand dollars, due in 1907. The bonds so issued had interest coupons attached, payable semi-annually, at the rate of six per cent. The property covered by the mortgage is described therein as follows: "All the corporate property, real, personal and mixed, including all lands, easements, rights of way, buildings, fixtures, materials, supplies, machinery and plant, franchises, contracts and choses in action, whether now owned or hereafter acquired or constructed by said gas company, together with the appurtenances thereto, and all rents, tolls, issues, income and profits of said gas company, present and future, to have and to hold the same unto said American Loan and Trust Company, its successors and assigns forever, upon trust for the equal benefit and security of all holders of said bonds, and subject to the following covenants, conditions and provisions which are assented to by both parties, to wit," etc. It must, I think, be admitted that this language is broad enough to cover not only all the property that the corporation then had, but all that it ever could have by any possibility, whether lands, chattels, moneys or things in action. But the language here used, broad and comprehensive as it is, is very much qualified and restricted by

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other provisions of the instrument as will be seen by reference to the following stipulations: I. "Until default occurs in some duty, or upon some covenant, agreement or promise of the gas company hereunder, said gas company, its successors and assigns shall retain the possession, control and enjoyment of all the property and franchises hereby mortgaged, and may receive and use the earnings, income and profits thereof in any manner not inconsistent with these presents, nor tending to lessen the security hereby provided." II. "The said gas company, for itself and its successors, covenants to pay to the several holders of the bonds hereby secured, the principal and interest of said bonds, according to the tenor and true intent of said bonds and the coupons thereto attached." V. "But if default be made in any payment of principal or interest upon said bonds when due, or in the performance of any covenant or agreement on the part of the said gas company herein contained, and if such default shall continue for the period of sixty days, then, and in either of said cases, the trustee may enter into and upon and take possession, management and control of all the property and franchises covered by these presents, and may operate the same, and continue the business, and exercise the franchises of said gas company, making all needful repairs, alterations and additions, and may collect and receive all earnings and income thereof." VII. "If any default shall occur or continue as in article five specified (that is, 'continue for the period of sixty days'), the trustee may, and upon the written request of the holder or holders of one-fourth or more of said bonds then outstanding, accompanied by indemnity as hereinafter provided, shall, with or without entry as aforesaid, proceed to foreclose this mortgage either by advertisement or sale according to law, or by proper judicial proceedings."

These several provisions of the instrument must obviously be read together in order to ascertain the real intention of the parties and the true construction which should be placed upon the agreement. Notwithstanding the broad general language used in the description of the property mortgaged it is plain that the mortgagor was to have, at least until default, the possession and enjoyment of all the property, whether existing at the time or acquired in the future, and was to use the future earnings for the purpose of conducting the business for which the corporation was organized. This must mean that it had a right to sell and transfer the future products of its operations as its own, free and clear from any lien of the mortgagee. The intention was that it should purchase materials for its business, employ labor, contract debts and discharge all obligations arising therefrom by the use of the products of the business or the earnings of the plant.

In this condition of things the corporation made default in the payment of the interest coupons due on the first of August, 1893,

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and on November 11th following the plaintiff, as substituted trustee, brought an action to foreclose the mortgage, and a receiver was appointed on the 16th of November, following, and on the same day, and at the same time, the sequestration creditor procured the appointment of a receiver in his action. The receiver in the foreclosure action took possession of the gas plant and proceeded to operate the works and to make and sell manufactured gas and electricity. At that time there were moneys in the office of the company and to its credit on deposit in banks, and due to it on open accounts for gas and electricity manufactured before, and it owed various debts for materials which it had purchased in conducting its business. There came to the hands of the receiver in the foreclosure action from the moneys on hand, prior to the commencement of the action, and from the earnings of the corporation prior to that date and after the execution of the mortgage, in the form of open accounts or notes the sum of over four thousand dollars, which the receiver in the sequestration action, representing general creditors, claims should be paid to him for distribution among such creditors. In other words, the question is, whether the earnings of the corporation from its business, in the sale of its products, prior to the time of the commencement of the action to foreclose the mortgage and the date of the possession by the receiver in that action, belong in equity to the bondholders or to the general creditors? The Special Term held that the general creditors of the corporation had the prior equitable right to the fund, but the orders of that court were reversed by the Appellate Division, which held that the fund in equity belonged to the receiver appointed in the foreclosure action for the benefit of the mortgage bondholders. An appeal to this court was allowed, and the following question certified for its opinion:

"Under and by virtue of the operation of the mortgage given by the Saratoga Gas and Electric Light Company, has the mortgagee, or the receiver appointed in the foreclosure action, an equitable lien, prior to the right of the receiver in the sequestration action, upon the debts and accounts due to the corporation upon sales by it of products of its plant, produced after the giving of the mortgage and before the appointment of either receiver?"

The right of the mortgagor to deal with these products and earnings as its own under the stipulations of the mortgage has already been noticed. That right, it seems to me, is entirely inconsistent with the existence of any lien upon future products or earnings by the mortgagee. The latter could not have a lien upon such earnings or products while the mortgagor was permitted to use them for the conduct of its business and the payment of its current debts. We think that the true construction of the instrument is this: Where a mortgage by a corporation to secure the payment of the

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principal and interest of its bonds, such as this is, is made, although in terms purporting to include future earnings and products, it does not, as against general creditors, operate as a lien upon such earnings until actual entry and possession under the mortgage by the mortgagee. This results from the stipulation in the instrument that until default the mortgagor shall have the use of the earnings in the conduct of its business, and that upon default the mortgagee may go into possession, exercise the corporate franchise and appropriate the earnings to the payment of the debt secured by the mortgage. The right of the mortgagor, in the meantime, to the use of the earnings, amounts, practically, to absolute ownership, and hence the mortgage can not operate as a lien upon such earnings to the prejudice of the general creditors until actual entry and possession taken, and then only upon what is earned after that time. The lien of the mortgage upon future earnings is consummated as against other creditors only by the fact of the possession of the property, and can not have any retroactive operation, since it would then deprive the unsecured creditor of the fund, upon the faith of which he may have given credit to the mortgagor during the time when the latter was permitted to deal with and use it as his own. The lien upon the earnings, in favor of the bondholders, attaches only upon what is earned after the time when the lien is perfected by entry and possession. This is the construction which has been given to corporate mortgages, expressed in substantially the same terms, by the Supreme Court of the United States, by the English courts and by the highest courts of many of our sister states. The authorities on this question are quite numerous and when examined will be found to sustain the proposition that I have stated. It will be quite sufficient to cite some of the cases without enlarging this opinion by any quotations from the discussion, since the decisions speak for themselves. (Galveston Railroad v. Cowdrey, 11 Wall. 459; Gilman v. Ill. & Miss. Tel. Co., 91 U. S. 603; American Bridge Co. v. Heidelbach, 94 U. S. 798; United States Trust Co. v. Wabash Western Ry. Co., 150 U. S. 287, 307; Teal v. Walker, 111 U. S. 242; Dow v. Memphis & L. R. R. Co., 124 U. S. 652; Sage v. Memphis & L. R. R. Co., 125 U. S. 361; Freedman's Saving & Trust Co. v. Shepherd, 127 U. S. 494; Ellis v. Boston, Hartford & Erie R. R. Co., 107 Mass. 1; Smith v. Eastern R. R. Co., 124 Mass. 154; Holmes v. Turner's Falls Co., 142 Mass. 590; Emerson v. European & N. American Ry. Co., 67 Me. 387; M. V. & W. Ry. Co. v. United States Express Co., 81 Ill. 535; DeGraff v. Thompson, 24 Minn. 452; Governments, etc., Invest. Co. v. Manila Ry. Co., L. R. (Appeal Cases 1897), 81.)

I have not been able to find any case in this state, and we are referred to none, where the precise question now under consideration

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has been determined, but it seems to me the principle which controls the case has been decided.

In Rochester Distilling Co. v. Rasey (142 N. Y. 570) there was a controversy between the plaintiff, who claimed title to chattels under a sale by the creditor on execution, and the defendant, who claimed title to the same chattels under a chattel mortgage, which, in terms, covered the grass growing upon the premises at the time of the execution of the mortgage, and also the products of the farm thereafter to be produced. The question in that case was whether the farm products, not existing at the time of the execution of the mortgage, but coming into existence thereafter by the ordinary operations of farming, were covered by the lien of the mortgage as against the execution creditor, and it was held that they were not. The only difference between that case and the one at bar is that here the fund in controversy was realized from the collection of accounts accruing to the mortgagor from earnings subsequent to the mortgage and before the appointment of either receiver. I can see no distinction in principle so far as concerns the question of equitable priority of lien between the future earnings of a corporation and the future products of a farm when both are described as covered by the lien of a mortgage.

There are numerous cases to be found in the books where the controversy in regard to the lien of a mortgage, like the one now under consideration, was between the parties to the instrument. These cases are scarcely applicable to the question involved in this appeal, which is one between the general creditors and the mortgage bondholders. Most of them are reviewed in the opinion of Judge Gray in the case last cited, and it is there shown that their authority is limited to controversies between the parties to the mortgage. Argall v. Pitts (78 N. Y. 239) and Frank v. N. Y., L. E. & W. R. R. Co. (122 N. Y. 197) are cases that bear somewhat on the questions now under consideration, though, perhaps, not directly.

In this case, it seems to me, that the sequestration creditor occupies the position of a plaintiff in a credtior's bill. If the receiver who represents the mortgage bondholders has the prior right to the fund in question, as the learned court below held, the practical operation and effect of the principle should not be overlooked. The foreclosure of a corporate mortgage does not necessarily mean a sale of the property in the ordinary sense. It simply means a reorganization conducted by or in behalf of the bondholders. Sometimes, but not often, the shareholders may be consulted, but it is rarely that a general creditor has any voice in the matter. The property mortgaged is generally of such a character, and the debt of such magnitude, that a public sale in the ordinary sense is seldom practicable. Whatever may be the real value of the property

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sold upon the foreclosure, there generally is and may always be a deficiency. If the receiver under the mortgage can go back of his appointment and appropriate earnings of the corporation accruing before his appointment and after the execution of the mortgage, in almost every case the only fund upon which the general creditor can rely for the payment of his debt may be absorbed by the bondholders, and this too although the receiver may have taken possession of or received the benefit of property furnished at their expense, and on the faith of the current earnings.

We think that justice and equity are best promoted by limiting the right or lien of the bondholders to such earnings only as shall accrue after the mortgage trustee or the receiver shall have actually taken possession. The earnings prior to that time should in equity be awarded to the general creditor.

For these reasons we think that the orders appealed from should be reversed and those of the Special Term affirmed, with costs, and that the question certified should be answered in the negative.

All concur.[4]

WAITE, C. J., in FOSDICK v. SCHALL, 99 U. S. 235. (1878.)

We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It

[4] A mortgage may cover both land and personal property, such a mortgage being for some purposes treated as two mortgages embodied in one instrument, e. g., for the purpose of applying the recording acts. A mortgage, therefore, which includes in the description of the property mortgaged, together with land, "all profits of the mortgagor, present and future," might be treated as to future profits, as a separate and independent mortgage of future personal property. As to its legal effect, if so considered, see article by Samuel Williston in 19 Harv. L. Rev. 557. But when the profits, upon which a lien is claimed by virtue of such a mortgage, were earned by the mortgagor in the possession and use of land which was mortgaged at the same time to the same mortgagee, such a mortgage of profits might meet with judicial annulment on the principles advanced in Teal v. Walker and Hazeltine v. Granger, supra, and cases cited.

As a matter of practice, mortgages covering future rents and profits usually contain, in substance, the other provisions found in the principal case.

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rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labor supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before any thing derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. Galveston Railroad v. Cowdrey, 11 Wall. 459; Gilman *et al.* v. Illinois & Mississippi Telegraph Co., 91 U. S. 603; American Bridge Co. v. Heidelbach, 94 *id.* 798.

The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The ap-

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pointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the Chancellor should so mould his order that while favoring one, injustice is not done to another. If this can not be accomplished, the application should ordinarily be denied.

We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act. The power rests upon the fact, that in the administration

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of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence.

In this case no special conditions were attached to the order appointing a receiver in the Circuit Court of the United States; and it is not contended that the intervener has brought himself within the rule fixed by the State court, in respect to the payment of general creditors. He asks to be paid a rent for his cars; but he entered into no express contract with the company which requires such a payment, and there is nowhere to be found any proof of an implied obligation to make such compensation. Two years and more before the appointment of a receiver by the State court, he contracted to sell his cars to the company at an agreed price, payable in instalments, secured by what was in legal effect a paramount lien upon the cars. Payments were made according to the contract until October, 1874, when they stopped. The cars remained in use after that, not under a new contract of lease, but under the old contract of sale. The price agreed upon not having been paid in full, the power of reclamation, which was reserved, has been exercised and sustained. The cars were not included in what was sold at the foreclosure sale, and consequently have contributed nothing directly to the fund now in court for distribution. So far as appears, no moneys growing out of the receivership remain to be applied on the bonded debt; and, if there did, through the rent already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars. There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever has been established upon the fund in court. Prima facie that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only.

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AMES v. RICHARDSON.

SUPREME COURT OF MINNESOTA, 1882.
29 Minn. 330.

BERRY, J. On December 16, 1879, Cochran, being owner of a piece of land in this state, insured a mill, machinery and fixtures therein against damage by fire, in the Western Manufacturers' Mutual Insurance Company, for $2,000. December 18, 1879, he borrowed of defendant $5,200, for which he gave his promissory note on five years, secured by a mortgage of the land mentioned, which was duly recorded December 22d. By the terms of the mortgage Cochran covenanted with Richardson that at all times during its continuance he would keep the buildings on the premises "unceasingly insured" for at least $5,200, payable in case of loss to Richardson, to the amount then secured by the mortgage. December 28, 1879, Cochran insured the mill, machinery and fixtures for $1,500 in one copmany, and for $2,000 in another, and, by indorsement upon each of the two policies issued to him, the loss was made payable to Richardson, as her interest might appear. On July 9, 1880, while the three insurances were in force, the insured property was totally destroyed by fire. Before this Richardson had no knowledge of the first insurance. The loss was adjusted by Cochran and the three insurance companies at $4,298.03, as the true value of the property destroyed. The result was that the losses payable to Richardson were scaled from $3,500 (the face of the last two policies) to $2,442.20, and this sum was paid to her and applied on the note. The loss under the first insurance was scaled and adjusted at $1,317.70, and that sum agreed to be paid Cochran accordingly. This was done July 19, 1880, and on the same day the certificate which had been issued to Cochran by the Western Manufacturers' Mutual Insurance Company, in lieu of a policy, was for a valuable consideration duly assigned to the plaintiffs. They brought this action against the insurance company to recover the amount of the loss as adjusted at $1,317.70. Nothing having been paid upon Richardson's note and mortgage other than the sum of $2,442.20 before mentioned, and the whole debt having been declared due under a provision in the mortgage, there remains due and unpaid thereon something over $3,000. Richardson laying claim to the money ($1,317.70) realized from the first insurance, the company paid it into court, and Richardson was substituted as defendant in the company's place. The question is, who is entitled to this money —plaintiffs or Richardson?

It is well settled that, in the absence of an agreement by a mortgagor to insure for the benefit of his mortgagee, the latter has no

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right to any advantage whatever from an insurance upon the mortgaged property effected by the former for his own benefit. 1 Jones, Mortg. pr. 401; Nichols v. Bacter, 5 R. I. 491; Plimpton v. Ins. Co., 43 Vt. 497; May, Ins. Par. 449, 456; Carter v. Rockett, etc., Ins. Co., 8 Paige, 437.

It is equally well settled that an agreement by the mortgagor to insure for the benefit of his mortgagee gives the latter an equitable lien upon the proceeds of a policy taken out by the former and embraced in the agreement. And when the agreement is that the mortgagor shall procure insurance upon the mortgaged property, payable in case of loss to the mortgagee, and the mortgagor, or some one for him, procures insurance in the mortgagor's or a third person's name, without making it payable to the mortgagee, though this be done without the mortgagee's knowledge, or without any intent to perform the agreement, equity will treat the insurance as effected under the agreement, (unless this has been fulfilled in some other way,) and will give the mortgagee his equitable lien accordingly. This is upon the principle by which equity treats that as done which ought to have been done. That is to say, inasmuch as the insurance effected ought to have been made payable to the mortgagee, equity will give the mortgagee the same benefit from it as if it had been. In support of these general propositions we refer to Thomas v. Voukapff, 6 Gill & J. 372; Carter v. Rockett, etc., Ins. Co., and Nichols v. Baxter, supra; Wheeler v. Ins. Co., 101 U. S. 439; Cromwell v. Brooklyn Fire Ins. Co., 44 N. Y. 42; Miller v. Aldrich, 31 Mich. 408; 1 Story Eq. Jur. par. 64g; 2 Am. Lead. Cas. (5th Ed.) 832-4; In re Sands Ale Brewing Co., 3 Biss. 175.

In the cases cited (with the exception of Nichols v. Baxter) the insurance was effected after the agreement to insure. In Nichols v. Baxter it would seem that the court thought this made no difference, though the opinion alludes (somewhat as a makeweight, as it occurs to us) to the fact, which appeared by inference only, that the insurance in that case, though effected before the agreement to insure, was understood by the parties to be embraced in it. We, however, can see no reason why the same rule should not be applicable to insurance already subsisting when the agreement to insure is made, as to that subsequently obtained, unless this result is affirmatively excluded by the facts of the case. Such subsisting insurance can be made payable to the mortgagee, or assigned to him, so as to satisfy the agreement. Where the agreement is, as in the case at bar, "to keep" the premises insured, it is entirely consistent with its letter as well as its spirit to hold that it embraces prior as well as subsequent insurance. And where, as in the present instance, the value of the insured property is such that subsequent insurance, sufficient to satisfy the agreement, can not be obtained so long as the prior insurance stands, this is an equitable circum-

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stance entitled to great weight upon the question whether the prior insurance ought to be held to be covered by the agreement. This equitable circumstance is much enhanced when the effect of the prior insurance is, as in this case, to scale and reduce the subsequent insurance procured and made payable to the mortgagee under the agreement.

In such a state of facts, to permit the mortgagor to withhold the prior insurance from the mortgagee is to permit him to profit by his own wrong, at the expense of him whom he has wronged, and a violation of one of the first principles of law as well as of equity. The question is not what the mortgagor's intention was with reference to the prior insurance, but whether it was equitable that, in carrying out any intention, he should be permitted to withhold the benefits from the mortgagee, especially in view of the maxim that equity regards that as done which ought to have been done. Cromwell v. Brooklyn Fire Ins. Co., Wheeler v. Ins. Co., Miller v. Aldrich, and In re Sands Ale Brewing Co., supra.

Applying these considerations to this case, we are of opinion that Richardson is clearly entitled to an equitable lien upon the proceeds of the first insurance, to be applied upon her note and mortgage. Cochran ought to have kept his covenant. He could have done this by procuring a third new policy, or by assigning the first insurance, or having it made payable to Richardson. As he did not do the former, he should have done the latter, and therefore Richardson is in equity entitled to stand in the same position as if he had done what he ought to have done.

Stearns v. Quincy Ins. Co., 124 Mass. 61, relied upon by the plaintiffs is not a case presenting the precise question whether an insurance effected before an agreement to insure is to be regarded as embraced in such agreement, so as to give a mortgagee an equitable lien on the proceeds. But the principle there enunciated, and which appears to be supported by other decisions of that state, is that the mortgagee can not have the lien unless the insurance was obtained by the mortgagor as his agent, or with intent to perform an agreement to insure. If this was to be regarded as the correct rule, it would seem to be decisive in the plaintiffs' favor. But it is against the weight and current of authority, and, as it seems to us, inequitable, and therefore we do not follow it.

Another question was discussed upon the argument, viz., whether the covenant to insure ran with the land, so that the record of the mortgage was constructive notice to the plaintiff and to all others of Richardson's (the mortgagee's) equities. We do not deem it at all necessary to consider this question. The mortgagor's assignment of his claim under the certificate after the loss was an assignment of a debt, a mere chose in action, which the plaintiffs took subject to all defenses and equities against him. Archer v. Mer-

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chants' & M. Ins. Co., 43 Mo. 434; Wilson v. Hill, 3 Met. 66; Brichta v. N. Y. Lafayette Ins. Co., 2 Hall, (N. Y.) 372; Mellen v. Hamilton Fire Ins. Co., 17 N. Y. 609; Greene v. Warnick, 64 N. Y. 220; May, Ins. par. 386. From all this it follows that, in our opinion, the defendant is entitled to the proceeds of the first insurance paid into the court, instead of the plaintiffs, as found by the court below.

There being no dispute as to the correctness of the findings of fact, the case is remanded, with directions to the district court to render judgment for the defendant accordingly. Though there is no formal reversal of the order denying a new trial, the defendant is entitled to costs, as of course.

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CHAPTER X.

PRIORITY BETWEEN MORTGAGE LIENS AND COMPETING CLAIMS TO THE LAND.

POMEROY, EQUITY, § 679. Among purely legal titles to the same subject-matter, successive legal conveyances of and legal estates in the same tract of land, the equitable doctrine of priorities growing out of the presence or absence of notice, or of a valuable consideration, or of any other incident, has absolutely no application nor effect; such legal titles, estates, and interests are, in the absence of any statutory modification, completely controlled, with respect to their priority, by the order of time. Even the mere want of a valuable consideration in the earlier conveyance would not, at the common law, affect the priority of legal right given by the priority of time.[1]

ERIE COUNTY SAV. BANK v. SCHUSTER.

COURT OF APPEALS OF NEW YORK, 1907.
187 N. Y. 111.

O'BRIEN, J.: This was an action for the foreclosure of a mortgage. Several persons were made defendants who have not appeared and judgment went against them by default. The defendants, the Schusters, however, appeared and answered, and the question involved in the case arises between these defendants and the plaintiff. The complaint contains the usual allegations in foreclosure cases. It alleges that the Schusters were in possession of the premises and claimed under some right or title inferior and subordinate to the lien of the mortgage and the usual relief in foreclosure cases was demanded against them, that is, that they be barred and foreclosed from all right, title and interest in the mortgaged premises. The Schusters, in their several answers, denied the allegation of the complaint that they claimed under a titled subordinate to the lien of the mortgage, and they alleged that they were in pos-

[1] See Burns v. Berry, 42 Mich. 176; Rumery v. Loy, 61 Nebr. 755; Ely v. Scofield, 35 Barb. (N. Y.) 330; Purdy v. Huntington, 42 N. Y. 334 (per Sutherland, J.); Fallass v. Pierce, 30 Wis. 443. See also, 11 Mich. L. Rev. 495.

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session under a deed executed by the proper authorities upon a sale of the land for taxes that were levied subsequently to the mortgage in question.

At the opening of the trial the answering defendants requested the court to dismiss the complaint as to them, since it appeared from the pleadings that they claimed under a title paramount to the lien of the plaintiff's mortgage. The court denied their motion and proceeded to take proof as to the nature of the defendants' claim of title. When the proofs were closed it appeared that the lands covered by the mortgage had been sold for taxes levied subsequent to the execution of the mortgage, and that they were bid in by the state and were afterwards sold by the commissioners of the land office to the defendants. The defendants again requested the court to dismiss the complaint as to them, since it now appeared that their title was paramount to that of the plaintiff. The motion was denied and the defendants excepted. The trial court found the facts here stated and other facts as to the execution of the plaintiff's mortgage and the amount due thereon, and he directed that the defendants, including the Schusters, should be forever barred and foreclosed from any right, title and interest in the property. There was an exception to this finding.

The answering defendants appealed from the judgment to the Appellate Division and the decision of the trial court was there reversed and the complaint dismissed as to them and the plaintiff has appealed to this court. We think that the judgment is correct. The appeal of the plaintiff presents but two questions of law, and in the opinion of the learned court below these questions are fully discussed and the conclusion is fully sustained by the cases in this state. Both questions are quite familiar, and it is unnecessary to refer to the authorities upon which the conclusion is based. There can be no doubt that a title resting upon a sale of land for taxes regularly conducted is paramount to the lien of a prior mortgage. The owner of such a mortgage has the statutory right of redemption upon giving notice to the public authorities as to his right and title, but it is unnecessary to discuss the proceedings to be followed in such a case, since it is not claimed that the plaintiff complied with the statute or is in an attitude seeking to redeem. The plaintiff simply insists that the lien of its mortgage is prior and superior to the title acquired by the tax sale. Upon that proposition the plaintiff rests its whole contention, and its position in this respect is obviously untenable.[2]

It is equally clear that the defendants in this case, who were in

[2] Compare, Osterberg v. Union Trust Co., 93 U. S. 424; Heiner v. Northwestern Mut. Life Ins. Co., 123 U. S. 747; Greenwalt v. Tucker, 8 Fed. 792; Abbott v. Frost, 185 Mass. 398; Allen v. McCabe, 93 Mo. 138; Becker v. Howard, 66 N. Y. 5; Blackwell v. Pidcock, 43 N. J. L. 165.

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possession under the tax title, were not proper parties to the action. Their title and possession cannot be assailed in an action to foreclose a mortgage, since they are entitled to defend their claim in a court of law in the usual way in which actions for the recovery of real property are tried. The defendants cannot be required to defend their title in an equitable action like this, but are entitled to have their rights passed upon by a jury in a court of law. It follows that the defendants had the right to object to have their title tried in this action, since it was not upon its face subordinate to the lien of the mortgage.[3]

The judgment appealed from is right and should be affirmed, with costs.

Cullen, Ch. J., Gray, Edward T. Bartlett, Werner and Chase, JJ., concur; Hiscock, J., not sitting.

Judgment affirmed.

GLASS v. FREEBURG.

SUPREME COURT OF MINNESOTA, 1892.
50 Minn. 386.

The defendant Olaf A. Freeburg was on May 17, 1890, the owner of a lot in Highland Park Addition in the city of Minneapolis, and on that day entered into an oral contract with Nels A. Freeburg to build thereon for him a block of brick flats and other improvements. The plaintiffs, James E. Glass and Daniel H. McEwen, soon thereafter contracted orally with Nels A. Freeburg to furnish, and did furnish and deliver upon the lot certain lumber and other materials worth $809.17, to be used, and which were used, in the construction of the building. Other persons furnished materials for and did work upon the building. On August 1, 1890, and while the construction was going on, Olaf A. Freeburg mortgaged the property to the Pioneer Savings and Loan Association for $8,000. The mortgage was recorded August 8, 1890. Some of the materials were purchased, and some of the work done under contracts made by Nels A. Freeburg with Fulton & Libbey and others a considerable time after this mortgage was made and recorded. The material men and mechanics afterwards filed liens on the property. This action was brought to foreclose these liens. The Freeburgs and the mortgagee and all the lien claimants were made parties. The trial court held the lien of Fulton & Libbey to be junior and subject to the mortgage, and they appealed.

MITCHELL, J.: Counsel for the respondent building association

[3] See ante, Chap. VII, note 3.

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claims that the correct construction of the findings of the trial court is that Nels A. Freeburg was merely the agent of Olaf A. Freeburg, and as such contracted in the name and behalf of his principal for material and labor for the construction of the buildings referred to. We do not concur with this view. We think the findings are clearly to the effect that Olaf, as owner of the premises, contracted with Nels for the erection by the latter of the buildings, and that the latter, as principal and in his own behalf, purchased and contracted for the material and labor for the construction of the same, and that when the court described him as the "agent" (as well as the contractor) of Olaf, "with authority and power to contract for labor and material for the construction of the buildings," it had reference merely to the legal principle upon which it is held that a contractor has authority to charge the land of the owner with debts for labor and material incurred by him in performing his contract. See O'Niel v. St. Olaf's School, 26 Minn. 329; Laird v. Moonan, 32 Minn. 358; Meyer v. Berlandi, 39 Minn. 442; Bardwell v. Mann, 46 Minn. 285. According to the findings we have, then, this state of facts: The owner of land made one entire contract with another for the erection thereon by the latter of certain buildings; that in the performance of his contract the contractor purchased from plaintiffs, and the plaintiffs furnished to him, certain material for the construction of such buildings on May 17, 1890, so that it must be taken as a fact that the actual work of the construction of the buildings was commenced as early as that date; that subsequently, and while the work was in progress, the owner of the premises executed a mortgage thereon to the respondent building association; that after this mortgage had been executed and recorded, and while the work was still in progress, the appellant, the Fulton & Libbey Company, furnished to the original contractor certain material for the construction of the buildings in question. So far as appears, and presumably, the erection of the building was one continuous job performed under the original contract between the owner and the original contractor. The original contractor never filed any claim for a lien, but the appellant, not having received its pay, seasonably filed its claim for a lien for the material thus furnished to the contractor.

The sole question on this appeal is whether the lien of the appellant is entitled to a preference over the mortgage of the building association. This question has never before been presented for our consideration. In Finlayson v. Crooks, 47 Minn. 74, each of the liens arose under a separate and independent contract by the claimant directly with the owner of the property. Moreover, the question of priority between the mortgagee and the lien claimants was not raised. In Hill v. Aldrich, 48 Minn. 73, the rights of subcontractors were not involved, and it also appeared that the mortgage was executed and recorded before anything had been done towards the con-

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struction of the building. In Haupt Lumber Co. v. Westman, 49 Minn. 397, the original contractor had not commenced performance of his contract when the mortgage was executed, but it was intimated that possibly a different result might have been reached had the work of the construction of the buildings been commenced before the execution of the mortgage. We have had occasion recently to refer to the fact that the mechanic's lien law fails to make any express provision with reference to cases where a mortgage or other incumbrance is placed on the premises after the work of construction has been actually commenced. But we have arrived at the conclusion that, even in the absence of any express provision on the subject, upon certain general equitable principles, and also as a necessary implication from certain provisions of the statute that are expressed, the appellants' lien is entitled to a preference over that of the mortgage. The lien of the original contractor for the entire building, if he had claimed one, would have been held to have attached at the date of the actual commencement of the work, or of the furnishing the first material, and no subsequent sale or incumbrance of the land by the owner would have affected this right, and any party purchasing or taking an incumbrance on the property while the buildings were thus in process of erection would have done so subject to it. The contract for the erection of the buildings being an entirety, the contractor, notwithstanding the mortgage to the building association, had a right to go on and finish them, and to insist on the priority of his lien for his entire pay over the lien of the mortgage. A subcontractor comes in by reason of his direct contract relation to the contractor, and the right of lien of the former for his claim is *pro tanto,* in a certain sense, substitutionary to that of the latter, and by relation is deemed to have attached at the date when the lien of the original contractor attached. The whole work, being done in the performance of one entire contract with the owner, is to be deemed a unit, whether done directly by the contractor himself or by subcontractors, and all liens therefor, without regard to the time in the progress of the work when the labor was done or the material furnished, are co-ordinate, and all attach by relation as of the date of the commencement of the work. The authority of the contractor to charge the land for the purposes of the contract is coextensive with the necessities of the building, and continues until it is finished, and the commencement of the building is notice to all the world of the existence of the power. Every one dealing with the property has the means, by ocular examination, of ascertaining whether work has been commenced or materials furnished on the ground.

The fact that buildings are in process of erection on premises charges every one with notice of the rights of the parties doing the work. If a building is being erected under a contract with the

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owner, any one dealing with the property is bound to take notice of the fact that labor and material for the completion of the building will be required, and that those who perform or furnish it will, under the law, be entitled to a lien therefor; and if they see fit to take a mortgage under such circumstances they assume the risk of its being subordinated to all liens which may attach to the premises for labor or material for the completion of the building in accordance with the contract under which it is being erected.

This rule is almost necessarily implied from the provisions of section 10 of the statute[4] regulating the enforcement of such liens as between the contractor and the subcontractors and as between the subcontractors themselves. The incongruities and confusion that would arise in attempting to carry out these provisions upon any other theory will be apparent on a moment's reflection, as, for example, where a lien is given to the contractor as well as to subcontractors, or where, after judgment, the contractor pays off the subcontractors and is subrogated to their rights.

Our conclusion is that appellants' lien is entitled to a preference over respondent's mortgage.

The cause is remanded, with directions to modify the judgment accordingly.[5]

[4] This section of the statute provided, among other things, that if, upon the foreclosure of the liens, the proceeds of the sale of the property was not sufficient to cover all the lien claims, "then to divide and distribute the same among the creditors in proportion to the amount due to each, and without priority among themselves." Acts of 1889, chap. 200, sec. 10.

[5] See also, Neilson v. Iowa R. R. Co., 44 Iowa 71; Nixon v. Cydon Lodge No. 5, 56 Kans. 298; Kay v. Towsley, 113 Mich. 281; In re Hoyt, Fed. Cas. No. 6805.

Under some statutes the liens date from the time when the contract was made under which the work was done or the materials furnished. Batchelder v. Rand, 117 Mass. 176; Paddock v. Stout, 121 Ill. 571.

See also, Crowell v. Gilmore, 18 Cal. 370; Henry &c. Co. v. Fisherdick, 37 Nebr. 207; Choteau v. Thompson, 2 Ohio St. 114.

"In a number of states the general rule as to priority between mechanics' liens and other incumbrances is modified to this extent: that where buildings or improvements are erected upon land subject to a prior incumbrance, the mechanic's lien takes priority over such incumbrance as to the building or improvement upon or for which the work was done or the material furnished, though it remains subordinate to the prior incumbrance as to the land itself and any other improvements which were upon it before the mechanic's lien attached.

"Statutes establishing this modification of the general rule as to priority have been held constitutional." 20 Am. & Eng. Enc. 481.

As to the title of a purchaser upon the foreclosure of a mechanic's lien, see Purser v. Cady, 120 Cal. 214; Van Buskirk v. Summitville Min. Co., 38 Ind. App. 198; Shields v. Keys, 24 Iowa 298.

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NORFOLK STATE BANK v. MURPHY.

SUPREME COURT OF NEBRASKA, 1894.
40 Nebr. 735.

NORVAL, C. J. On the 24th day of June, 1890, appellee Fred W. Gray commenced an action in the district court of Douglas county against Martin T. Murphy to recover the amount due on a promissory note executed by Murphy. Summons was duly served upon Murphy on June 26, and at the September, 1890, term of said court, to-wit, on the 3rd day of January, 1891, Gray recovered a judgment in said action against Murphy for $1,285.49 and costs. The September term, 1890, of the district court of the county of Douglas convened on the 22d day of September. After the commencement of said suit, and while the same was pending, on the 29th day of November, 1890, Murphy and his wife gave to appellant, the Norfolk State Bank, a mortgage upon certain real estate in Douglas county to secure the payment of a promissory note for $4,676.70, executed by Murphy to cover his overdrafts on the bank. The property described in the mortgage was owned by Murphy prior to the commencement of the term of court at which the judgment aforesaid was rendered. On the 11th day of September, 1891, the Norfolk State Bank brought its action in the court below to foreclose said mortgage, to which the Murphys, Fred W. Gray, and others were made defendants. Gray filed an answer, setting up said judgment, and praying that the same be decreed a lien on the premises included in plaintiff's mortgage prior to the lien of the mortgage. Upon the trial a decree was entered foreclosing the mortgage, but making the lien thereof junior to the judgment lien of Gray.

The sole question to be decided on this appeal is, which lien has priority, the mortgage or judgment? The determination of the question necessitates an examination of section 477 of the Code of Civil Procedure, which reads as follows:

"Sec. 477. The lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution."

The language just quoted is too plain to admit of more than one construction, and that is, all judgments rendered in a district court in actions brought therein prior to the term, except judgments by confessions, become liens upon the real estate of the judgment debtor situate within the county from the first day of the term. At com-

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mon law all judgments of a court of record relate back to the first day of the term, and are regarded as rendered on that day, no matter on what day of the term they were actually entered. Our statute is declaratory of the rule of the common law, and places all judgments of a district court, except rendered on confession, or in cases in which actions were instituted during the term, upon equality in regard to liens. The judgment of Gray has relation to the first day of the term at which the same was recovered, and was a lien upon the lands owned by Murphy within the county from the first day of such term. The same construction was placed upon the statute in Miller v. Finn, 1 Neb. 294, and was followed in the case of Colt v. Du Bois, 7 Neb. 391.

It is insisted by counsel for plaintiff in error that the section quoted merely determines the priority of liens of judgment creditors as between themselves; and further, that the lien of a mortgage duly recorded during a term of court, and before the entry of a judgment at that term, is paramount to the lien of a judgment. We are unable to so construe the statute. It in express terms declares that "the lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered." Plainer language could not have been selected. The lien of a judgment does not attach merely to the debtor's interest in lands when the judgment is obtained, but to whatever interest therein he possessed on the first day of the term at which the same was entered. To hold otherwise would be to make the law, and not simply to apply the same. A judgment being a lien upon real estate from the first day of the term, such lien is superior to the lien of a mortgage subsequently given by the debtor. To adopt the construction contended for by counsel would be injecting words into the statute by judicial interpretation, which we have no power to do. Had the legislature intended that the doctrine of relation as to lien of judgments should not apply where a mortgage is recorded before the judgment is actually entered, it would have used apt words indicative of such purpose. Our conclusion is that the lien of the mortgage is junior to that of the judgment. The construction we have given the section does not conflict with the prior decisions of this court cited in the brief of counsel, as a cursory examination of the cases will disclose.

In Galway v. Malchow, 7 Neb. 285, certain judgments were recovered against Malchow after the recording of a mortgage given by him to the plaintiffs. By mistake the land intended to be included in the mortgage was described as being in section 28 instead of section 33. It was held that the lien of the judgments were subject to the equity of the mortgage. The proposition we have been discussing was not involved nor passed on in that case. That decision simply

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affirms the doctrine that a judgment upon real estate is subject to all prior equities existing against the debtor at the time of its becoming a lien. This court did not undertake to decide at what date the lien of a judgment attaches to the lands of the defendant. The rule stated in Galway v. Malchow has been reaffirmed and applied in Metz v. State Bank of Brownville, 7 Neb. 165; Mansfield v. Gregory, 8 Neb. 434, 11 Neb. 297; Leonard v. White Cloud Ferry Co., 11 Neb. 338; Dewey v. Walton, 31 Neb. 819. It is unnecessary to point out the difference between the facts upon which they were decided and those in the case we are considering. It is sufficient to say that in none of the cases mentioned was section 477 of the Code before the court for consideration, nor was the question raised by this record discussed therein. Under the above authorities a judgment lien is subject to all prior liens on the land of the defendant; but this principle does not militate against the construction we have given section 477. Had plaintiff's mortgage been made before the term of court at which Gray's judgment was entered, although recorded subsequent thereto, the cases would have some bearing here; but it was not so made, hence the judgment lien antedates the mortgage. The effect of the decisions of this court is that a creditor acquires no better right to his debtor's property than the latter himself has. The lien of a judgment is subordinate to all equities which existed in favor of third parties when the lien of a judgment is limited to the actual interest the debtor has in the property.

Another decision of this court relied on by the appellant is Horn v. Miller, 20 Neb. 98. It was there ruled that the time within which to perfect an appeal taken from a decree of the district court begins to run from the date on which the court formally announces its conclusion and judgment, and not from the date on which the clerk enters the same on the court journal. Horn v. Miller was expressly overruled in Bickel v. Dutcher, 35 Neb. 761, it being there decided that the time within which an appeal may be taken does not commence running until the decree is entered of record. For the purposes of an appeal, the date of a judgment is deemed to be the time it is actually sprad upon the records, but that is no reason for holding that the lien of a judgment does not attach until that time. The language of the section relating to the time for perfecting appeals is quite different from the provision on the subject of judgment liens. For the purpose of an appeal the date of a judgment is regarded as having been rendered at one time, while for the purpose of binding the lands of the debtor, by a legal fiction, it is considered as having been entered at a date often anterior to the time it was pronounced by the court.

The decisions of this court to the effect that a judgment does not become a lien upon the lands of the defendant, as against a subsequent purchaser, without notice, until properly indexed have no ap-

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plication to the case at bar, since plaintiff is not such a purchaser. It is not even a good faith mortgagee. The bank did not extend credit to Murphy on the strength that the land was free from liens, but the mortgage was given to secure a prior indebtedness of the mortgagor. When the security was taken the officers of the bank knew, or ought to have known, that the records of the district court of Douglas county disclosed that the action was pending against Murphy, and that a judgment might be recovered therein during the term which would be a lien on the land. We are unable to perceive that the statute relating to *lis pendens,* section 85 of the Code, has any bearing upon the question under consideration, since in actions at law to recover money judgments, merely, no notice of their pendency is required to be given to third parties. It is only in a suit brought to affect the title to real property that the statute requires that notice *lis pendens* shall be given. The pendency of an action to recover a money judgment is of itself notice to any one purchasing the lands of the defendant during a term of court that before the close of the term the plaintiff may recover a judgment therein which will be a lien upon said real estate. We know that text-writers state the general rule to be that judgments do not relate back to the first day of the term so as to create a lien on the real estate of the defendant anterior to their rendition, and such is the trend of decisions of the courts in most of the states. But it should be remembered that all the states, excepting a few, have statutes which in express terms provide that judgments shall become liens upon the lands of the debtor, either from the date on which they are rendered, or the last day of the term. (Black, Judgments, sec. 443.) Such, however, is not the common-law rule, nor is it the doctrine in states having statutes similar to our own. Mr. Black, in his treatise on Judgments, at section 441, observes that "it was the rule of the common law (and this rule still obtains in some of the states) that the judgments of a court of record all relate back to the first day of the term, and are considered as rendered on that day, and therefore their lien will attach to the debtor's realty from the beginning of the term, and will override a conveyance or mortgage made on the second, or any succeeding day, although actually prior to the rendition of the judgment." True, the same author in the next section says that "as against intervening purchasers it may be regarded as settled that the lien of a subsequent judgment will not attach, justice forbidding that in such a case it should relate back to a time anterior to the conveyance," citing Morgan v. Sims, 26 Ga. 283; Pope v. Brandon, 2 Stewart (Ala.) 401. The same doctrine is stated in a note on page 115 of volume 12 American & English Encyclopedia of Law, and the following, in addition to the Georgia case above referred to, are cited in support thereof: Skipwith v.

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Cunningham, 8 Leigh (Va.) 272; Withers v. Carter, 4 Gratt. (Va.) 407; Brockenbrough v. Brockenbrough, 31 Gratt. (Va.) 580.

An examination of the foregoing authorities will disclose that all but one fall far short of sustaining the principle they are cited to support.

* * * * * * *

We have been unable to find, although we have made diligent search, a single decision under a statutory provision similar to the Nebraska statutes which sustains the contention of counsel for appellant. We do not think that the district court erred in giving the judgment priority over the mortgage. The decree is affirmed.[6]

[6] "At common law, a creditor had no remedy against the lands of his debtor for the satisfaction of his claim; but by 13 Edw. I. c. 18, it was provided that, when a debt is recovered or damages awarded, it shall be thenceforth "in the election" of the creditor to have a writ of fieri facias against the goods and chattels of the debtor, or else a writ that the sheriff deliver to him all the chattels of the debtor and the one-half of his land. The writ issued to the sheriff under this statute was called a writ of elegit, because it stated that the creditor had elected (elegit) to pursue the remedy furnished by the statute. In construing this statute it was decided that the creditor could enforce his remedy against the lands even in the hands of one to whom they had been sold by the debtor after the recovery of the judgment, and this in effect made the judgment a lien or incumbrance on all the lands of the debtor. In one or two states the lien has been regarded as existent by force of this statute, or of a colonial statute giving a right to levy an execution, but it is usually considered that no such lien exists, in the absence of a state statutory provision therefor, and there is, in most of the states, such a provision subjecting the judgment debtor's land, or certain interests therein, to the lien of a judgment.

* * * * * * * *

"At common law, a judgment related back to, and was regarded as rendered upon, the first day of the term. This rule still applies in some states, so as to give the lien of the judgment precedence over a prior conveyance made during the term. More generally, however, the lien attaches either at the time of the rendition of the judgment or at the time of its docketing or record." Tiffany, Real Property, § 570.

Compare, Root v. Curtis, 38 Ill. 192; Ray v. Adams, 4 Hun (N. Y.) 332.

"In some states, the delivery to the sheriff of a writ of execution creates a lien on such property of the judgment debtor as is subject to levy under the execution. In most states, however, the mere delivery of the writ to the sheriff does not create any lien, and a levy under the writ is necessary to make the claim of the creditor effective.

"So far as a lien already exists by force of the judgment, any additional lien by virtue of the execution is usually of no value, and, in view of the fact that the former lien is recognized in most of the states there seems to be but slight occasion for the consideration of an execution lien in connection with the law of land." Tiffany, Real Property, § 572.

As to the title of a purchaser at execution sale, see Cockey v. Milne's Lessee, 16 Md. 200; Paxton v. Sterne, 127 Ind. 289; Higman v. Stewart, 38 Mich. 513.

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Irvine, C., having presided in the court below, took no part in the above decision.

Ryan, C., dissenting.

TEFFT v. MUNSON.

COMMISSION OF APPEALS OF NEW YORK, 1874.
57 N. Y. 97.

This was an action to restrain defendants, loan commissioners for Washington county, from foreclosing a mortgage executed to them by Martin B. Perkins and wife.

On the 18th day of January, 1848, Gamaliel Perkins purchased of Cortland Howland certain lands in Washington county, which were conveyed to him by warranty deed recorded March 7, 1848, in the clerk's office in said county. Gamaliel Perkins, immediately after his purchase, let his son, Martin B. Perkins, into possession of the premises, who forged a deed of the land from his father to himself and placed it upon record in the clerk's office of said county, May 27, 1850. On the 1st day of October, 1850, Martin B. and his wife executed a mortgage upon said land to the loan commissioners of said county, to secure the sum of $1,000 loaned to him. This mortgage contained covenants that Martin B. and his wife were lawfully seized of a good, sure, perfect, absolute and indefeasible estate of inheritance in the premises, and that they were free and clear of and from all former and other gifts, grants, bargains, sales, liens, etc.; and this mortgage was, on the day of its date, duly recorded in the book kept by the loan commissioners, as required by law. On the 23d day of January, 1860, a deed of said lands bearing date April 1, 1853, was recorded in the county clerk's office, which purported to be executed by Martin B. and wife to his father. On the 16th day of December, 1859, Gamaliel Perkins conveyed said land to Martin B., by deed recorded January 14, 1860. Until this conveyance from his father Martin B. had no title to the land, although he remained in possession of the same from 1848. On the 31st day of January, 1867, Martin B., being still in possession of the lands, conveyed them to the plaintiff, who paid full value for the same without any actual notice of the mortgage to the loan commissioners. The deed to the plaintiff was recorded February 9, 1867.

The court below decided that plaintiff was not entitled to the relief sought and directed a dismissal of the complaint. Judgment was perfected accordingly.

EARL, C. The plaintiff claims that the mortgage to the loan commissioners has no validity as against him, and that his deed has

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priority over it under the laws in reference to the registry of deeds and mortgages. It is a principle of law, not now open to doubt, that, ordinarily, if one who has no title to lands, nevertheless makes a deed of conveyance, with warranty, and afterward himself purchases and receives the title, the same will vest immediately in his grantee who holds his deed with warranty as against such grantor by estoppel. In such case the estoppel is held to bind the land, and to create an estate and interest in it. The grantor in such case, being at the same time the warrantor of the title which he has assumed the right to convey, will not, in a court of justice, be heard to set up a title in himself against his own prior grant; he will not be heard to say that he had not the title at the date of the conveyance, or that it did not pass to his grantee in virtue of his deed. (Work v. Welland, 13 N. H. 389; Kimball v. Blaisdell, 5 *id.* 533; Somes v. Skinner, 3 Pick. 52; The Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 567; Jackson v. Bull, 1 John. Cas. 81, 90; White v. Patten, 24 Pick. 324; Pike v. Galvin, 29 Maine 183.) And the doctrine, as will be seen by these authorities, is equally well settled that the estoppel binds not only the parties, but all privies in estate, privies in blood and privies in law; and, in such case, the title is treated as having been previously vested in the grantor, and as having passed immediately upon the execution of his deed, by way of estoppel. In this case Martin B. Perkins conveyed the lands to the loan commissioners by mortgage with warranty of title, and thereby became estopped from disputing that, at the date of the mortgage, he had the title and conveyed it; and this estoppel applied equally to the plaintiff to whom he made a subsequent conveyance, by deed, after he obtained the title from his father, and who thus claimed to be his privy in estate. The plaintiff was estopped from denying that his grantor, Martin B. Perkins, had the title to the land at the date of the mortgage, and he must, therefore, for every purpose as against the plaintiff, be treated as having the title to the land at that date.

I, therefore, can see no difficulty in this case, growing out of the law as to the registry of conveyances. Martin B. Perkins, having title, made the mortgage which was duly recorded. He then conveyed to his father and the deed was recorded. His father then conveyed to him and the deed was recorded. He then conveyed to the plaintiff and his deed was recorded. Thus the title and record of the mortgage were prior to the title and record of the deed to plaintiff, and the priority claimed by plaintiff cannot be allowed. Assuming it to be the rule that the record of a conveyance made by one having no title, is, ordinarily, a nullity, and constructive notice to no one; the plaintiff cannot avail himself of this rule, as he is estopped from denying that the mortgagor had the title at the date of the mortgage. The case of White v. Patten (supra) is entirely analogous to this. In that case, the plaintiff derived his title from

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a mortgage, made to him by one Thayer, containing covenants of seizin, warranty, etc., and recorded February 19, 1834. At the time of the execution of this mortgage the title was not in Thayer, but in one Perry, his father in law. Perry afterward, by deed, recorded, August 2, 1834, conveyed the land in fee simple to Thayer, who conveyed the land by mortgage to the defendant, recorded the same day. The counsel for the defendant used the same arguments in a great measure, which have been urged upon our attention by the counsel for the plaintiff in this case, both as to the title and the registry of the mortgages; and, yet the court held in a very able opinion, that the plaintiff had the prior and better title.

I am, therefore, of opinion that the judgment should be affirmed, with costs.

For affirmance, Earl, Gray and Johnson, CC.

For reversal, Lott, Ch. C., and Reynolds, C.

Judgment affirmed.[7]

[7] See also, Whipple v. Pope, 33 Ill. 334; Cockrill v. Bane, 94 Mo. 444. And see Tiffany, Real Property, §§ 456, 476; and Jones, Mortgages, § 1483.

"The claim of title set up and made by the defendant Parks, through the tax deed to Ballard and thence by quitclaim to himself, is unavailing [as a defense to this suit to foreclose a mortgage]. Parks acquired title to the land in 1860. The deed was issued for the unpaid taxes of 1861, assessed after Parks became the owner. As the owner in fee of the land (subject to the mortgages, or which became subject by his omission to record) and party presumptively in possession and liable by law for the payment of the taxes at the time of assessment, Parks could gain no advantage as against any one by suffering the land to go to sale, and then taking a quitclaim from the grantee in the tax deed. This was but a circuitous and dilatory way of paying the taxes, and after all, nothing but a payment which it was his legal duty to have made in the first place. 20 Wis. 356; 22 Wis. 175; 22 Maine 331. It is impossible to conceive of a speculation in tax titles upon one's own lands, or how the owner who is under obligation to the public and bound by law to pay the taxes, can change his status or affect his title by such roundabout proceedings. He must in the end come right back to the point whence he started. It is clearly not the policy of the law to encourage delays of this kind in the payment of taxes." Dixon, C. J., in Fallass v. Pierce, 30 Wis. 443, 481.

Compare, Frye v. Bank of Illinois, 11 Ill. 367; McAlpine v. Zitser, 119 Ill. 273; Stears v. Hollenbeck, 38 Iowa 550; Shrigley v. Black, 66 Kans. 213; Sands v. Davis, 40 Mich. 14; MacEwen v. Beard, 58 Minn. 176; Drew v. Morrill, 62 N. H. 565.

Compare Chap. VIII, note 3, and Christ Church v. Mack, supra.

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GILLIAM v. MOORE.

COURT OF APPEALS OF VIRGINIA, 1832.
4 Leigh (Va.) 30.

Ejectment. Upon the trial, the jury found a special verdict, stating, in substance, the following case:

W. B. Gilliam being seized in fee of the 560 acres of land, whereof the land in question was parcel, sold the whole 560 acres to J. S. Moore, for £1,000 and conveyed the same to him by deed of bargain and sale, dated the 10th October, 1804; and Moore, on the same day, by deed of bargain and sale (purporting to be the deed of Moore and Anna his wife, but she never executed it) conveyed the land to trustees, upon trust to secure payment of the purchase money to Gilliam. Several years afterwards, the whole 560 acres of land was duly sold by the trustees, in pursuance of the deed of trust, to pay the purchase money due to Gilliam; and at that sale, Gilliam himself became the purchaser, and the trustees conveyed the land to him; but before he got possession of it, Moore died. Moore's mansion house was on part of the land and his widow, Anna Moore, claimed to hold possession of this part on which the mansion house was situated, until dower of the whole tract should be assigned to her, under the provisions of the statute, 1 Rev. Code, ch. 107, sec. 2, p. 403. And the question of law upon the verdict, was, whether Mrs. Moore was entitled to dower of the 560 acres of land or not?

The circuit court gave judgment for her; to which, upon the petition of Gilliam, this court awarded a supersedeas.

CARR, J. The first and principal question arising on this special verdict is, whether under the deed from Gilliam to Moore, a title to the land vested in Moore, whereof his wife was dowable? I am clearly of opinion, that she was not dowable. It was objected, that the verdict has not found, that the deeds were executed at the same time, and as parts of the same transaction, and that, this being a special verdict, we cannot draw this inference; but to my mind the finding is abundant to justify, and indeed to compel, the conclusion, that the two instruments were parts of one and the same transaction, and that the seizin of Moore was that instantaneous seizin, spoken of in the books, where the land was merely in transitu, and never vested in the husband. The deeds bear the same date; they are between the same parties; relative to the same subject matter. The vendor conveys the land, for so much money; the vendee reconveys it to secure that money. It is impossible to doubt for a moment, the meaning, connection and (I may say) unity, of the transaction. We have no reported case in our own books directly in point; and this, no doubt, has resulted from the general impression

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of the bar, that no such right existed in the widow; for the case must have happened a thousand times. The English books, however, all lay down the position that a transitory seizin in the husband for an instant, does not entitle the wife to dower, and the point has been decided in the same way, in Massachusetts and New York. A different decision at this day, would be exceedingly mischievous, and open an inexhaustible source of litigation. * * *

TUCKER, P.

* * * * * * *

The real question, in this case, is as to the right of dower. The authorities cited by the counsel for the plaintiff in error, leave no doubt that where the vendor passes the title to the vendee, and at the same time takes a mortgage or deed of trust for the security of the purchase money, in which the wife of the vendee does not join she will nevertheless take her dower in the estate subject to the trust or mortgage. In such case, the husband is seized but for an instant, and not beneficially for his own use; the deed of conveyance, and the mortgage or deed of trust, are to be considered, like the levy of a fine, as parts of the same transaction and of the same contract; as taking effect at the same instant, and as constituting but one act. If both contracts were contained in the same instrument, there could be no doubt; and it is the same thing though they are contained in different instruments, provided they are parts of the same contract, and make together but one transaction. That they are parts of the same transaction, must be presumed where they are executed at the same time; and, moreover, as they cannot be absolutely isochronous, as there must be some interval, however small, the court ought always to take the same day to mean the same time, unless the contrary be found—unless it be found, that the acts were separate, distinct and independent.

Judgment reversed, and judgment entered for the plaintiff.[8]

STEWART v. SMITH.

SUPREME COURT OF MINNESOTA, 1886.
36 Minn. 82.

Plaintiff brought this action in the district court of Hennepin county, to determine adverse claims to certain land in that county. The action was tried, without a jury, by Young, J., who found the

[8] Compare Perkins v. Davis, 120 Mass. 408. As to the effect of a mortgage executed at the same time that the mortgagor receives his title, but not for purchase money, see Atkinson v. Hancock, 67 Iowa 452; Hazleton v. Lesure, 9 Allen (Mass.) 24; Ray v. Adams, 4 Hun (N. Y.) 332; Weil v. Casey, 125 N. C. 356.

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facts recited in the opinion, and directed judgment for the plaintiff. The defendants appeal from an order refusing a new trial.

MITCHELL, J. Both parties claim title through Hiram Burlingham—defendants under an execution sale on a judgment against Burlingham rendered and docketed in October, 1859; plaintiff under a foreclosure sale on a mortgage from Burlingham to one Sidle, executed and recorded September 16, 1861. The facts regarding the execution of this mortgage, as found by the court upon undisputed evidence, are, in substance, that Burlingham, being desirous of entering this land by pre-emption, applied to Sidle for money with which to make the entry; that it was agreed between them that Sidle should lend Burlingham the money or land-warrant with which to make the entry, and that, as security therefor, Burlingham should give Sidle a purchase-money mortgage on the land when entered; that pursuant to the agreement Sidle loaned Burlingham the funds with which to enter the land; that thereupon Burlingham immediately went from his home (both parties resided in Minneapolis, 80 or 90 miles distant from the land-office) to Forest City, where the land-office at which the entry was to be made was situated, and upon his arrival, on Friday, September 13th, entered the land, paying therefor with the funds loaned him by Sidle, and immediately started back for his home, where he arrived on Sunday, September 15th; that on Monday, September 16th, pursuant to the agreement above referred to, he and his wife executed to Sidle the mortgage in question as security for the money so loaned and interest, according to the previous agreement of the parties.

Upon this state of facts it is quite clear that the lien of Sidle's mortgage had precedence over the lien of defendant's judgment. This is so under the familiar doctrine, more than once approved by this court, that a purchase-money mortgage, executed at the same time with the deed of purchase, takes precedence of any other claim or lien arising through the mortgagor. It will take the precedence whether executed to the vendor or to a third person who advanced the purchase-money which was paid to the vendor. Jones v. Taintor, 15 Minn. 423, (512), Jacoby v. Crowe, post, p. 93; 4 Kent. Comm. *39; Washb. Real Prop. *176; Jones Mortg. 416.[9]

The case of Jones v. Taintor, *supra,* is decisive of the present case,

[9] Accord: Kaiser v. Lembeck, 55 Iowa 244; Clark v. Munroe, 14 Mass. 351; Haywood v. Nooney, 3 Barb. (N. Y.) 643. In a few states, the contrary rule prevails, apparently as a result of a statutory definition of purchase-money mortgages. See Heuisler v. Nickum, 38 Md. 270; Stansell v. Roberts, 13 Ohio 148.

As to the status of a purchase-money mortgage to a third person who has advanced part of the purchase price, as against a purchase-money mortgage to the vendor for the balance of the purchase price, see Brower v. Witmeyer, 121 Ind. 83; Schoch v. Birdsall, 48 Minn. 441; Rogers v. Tucker, 94 Mo. 346.

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the facts in both being almost identical. An attempt is made to distinguish the two cases because in the former the claim was the right of dower of the widow of the mortgagor, while in the present case it is the lien of judgment against the mortgagor. There is no room for any such distinction. The doctrine which gives precedence, in such cases, to a purchase-money mortgage, is one of equity, and not of statutory origin, and applies to any claim to or lien upon the property arising through the mortgagor.

The present case is also sought to be taken out of the operation of the rule because the purchase of the land and the execution of the mortgage were not simultaneous, Burlingham having entered the land and obtained his certificate of entry on Friday, September 13th, while the mortgage to Sidle was not executed until Monday, September 16th. The rule, as generally stated in the books, is that to give a purchase-money mortgage this precedence it must have been executed simultaneously, or at the same time, with the deed of purchase. Some ground for a narrow and literal construction of this language is furnished by the fact that the reason usually assigned for the doctrine is the technical one of the mere transitory seizin of the mortgagor, rather than the superior equity which the mortgagee has to be paid the purchase-money of the land before it shall be subjected to other claims against the purchaser. But it is evident, both upon principle and authority, that what is meant by this statement of the rule is not that the two acts—the execution of the deed of purchase and the execution of the mortgage—should be literally simultaneous. This would be almost an impossibility. Some lapse of time must necessarily intervene between the two acts. An examination of the cases will show that the real test is not whether the deed and mortgage were in fact executed at the same instant, or even on the same day, but whether they were parts of one continuous transaction, and so intended to be, so that the two instruments should be given contemporaneous operation in order to promote the intent of the parties. 1 Washburn, Real Prop. *178; Wheatley v. Calhoun, 12 Leigh, 264; Love v. Jones, 4 Watts 465; Snyder's Appeal, 91 Pa. St. 477. Hence it will be found that in some of the cases the fact that the mortgage was executed pursuant to an agreement made prior to the execution of the deed of purchase has been the controlling consideration upon which the mortgage has been given precedence, although not in fact executed until some time after the execution of the deed. The reason is that such a state of facts would show that both acts were but parts of the same continuous transaction. As evidence of the fact, such previous agreement would have equal probative force, although it might not be enforceable, because not in writing, and within the statute of frauds. Even if such agreement, while executory, was not enforceable, yet, when once executed by the execution of the mortgage,

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it becomes as effectual as if originally in writing, and in equity will be deemed (if the rights of no innocent purchaser have intervened) as taking effect by relation as of the date of the agreement.

The facts bring the case clearly within the rule. There was a previous agreement that Burlingham should, after entering the land, give Sidle a purchase-money mortgage upon it. The mortgage was subsequently executed in pursuance of that agreement, and as soon after the entry of the land as was reasonably practicable. Both acts were evidently intended by the parties as parts of a single continuous transaction.[10]

There is no force to the suggestion that one "40" of the land entered was not included in the mortgage. If Sidle, either by mistake or intentionally, took security for the purchase-money on only part of the land purchased, defendants certainly have no ground of complaint.

As these views are necessarily decisive of the case, it is unnecessary to consider any of the other points discussed by counsel.

Order affirmed.

DUSENBURY v. HULBERT.

COURT OF APPEALS OF NEW YORK, 1875.
59 N. Y. 541.

This was an action to foreclose a mortgage executed by John La Grange to Lewis Seymour, plaintiff's testator, upon lands in Cortland county. Defendant George A. Hulbert was made a party, as assignee, of a mortgage made by La Grange to George O. Bowen. Hulbert answered alleging his mortgage to be a purchase-money mortgage and a prior lien.

[10] In Ray v. Adams, 4 Hun (N. Y.) 332, the grantee, before receiving his conveyance, obtained from plaintiff, to whom he already owed $500, a loan of $500 more to enable him to make his purchase, agreeing to secure the whole amount, $1,000, by a mortgage of the land to be executed as soon as it was conveyed to him. The mortgage was not, however, executed until about a year after the conveyance. Prior to the conveyance, the defendant had recovered a judgment against the grantee. The action was brought to foreclose the mortgage. It was held that, as to the $500 advanced for the purchase of the land, the lien of the mortgage was prior to that of the judgment, but that, as to the prior debt, the judgment was entitled to priority.

In Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264, a deed of trust by grantees to secure purchase money due the grantor, executed ten months after the grant, in pursuance of a stipulation in the contract of sale, was held paramount to the dower rights of the widow of one of the grantees.

See also, Spring v. Short, 90 N. Y. 538.

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The facts which were undisputed were briefly as follows: On the 1st day of April, 1868, Bowen had the legal title and was in possession of the premises in question. He had before that contracted to sell them to La Grange for $2,500, $100 of which had been paid. The balance, by the terms of the contract, was to be paid and secured on that day. Seymour, who resided in Binghamton, had agreed to loan La Grange $1,500, to be secured by a bond and a mortgage on the premises. On the first day of April La Grange went to Binghamton and delivered his bond to Seymour for the loan of $1,500, and agreed to execute a mortgage on the premises and have it recorded in the county clerk's office and represented that he owned the premises and had a deed of the same, and it was understood that Seymour's mortgage was to be the first lien. Seymour on that day paid to La Grange $900, and the next day, the second of April, sent him by express $600, being the balance of the loan. La Grange paid Bowen $900 on the second, $500 on the third and $100 on the sixth of April, when he received a deed from Bowen, and at the same time gave back a mortgage for $900 to secure the balance of the purchase-money and took possession of the premises. La Grange executed and acknowledged the mortgage to Seymour on the first day of April and left it at the clerk's office for record, with the deed from Bowen, on the fourteenth of April. The purchase-money mortgage to Bowen was recorded on the seventeenth of April, when he sold and assigned it to the defendant.

Upon these facts both the Special and General Terms held that the Seymour mortgage was entitled to preference, although they differ as to the grounds of the decision, the former holding that it was protected by the recording act, and the latter upon the ground of superior diligence.

CHURCH, Ch. J. This is a contest for priority of mortgages. There are two aspects in which to consider the plaintiff's mortgage, one as a prior and the other as a subsequent lien. If it is to be deemed as executed and delivered on the first day of April the question is, whether it was a prior lien to that of the Bowen mortgage. I think it very clear that it was not. It would attach, as between the parties, to whatever equitable interest La Grange had by virtue of his contract of purchase, and on the sixth it would attach to such further interest as he then acquired, but that interest was the legal title subject to the purchase-money mortgage. The deed and Bowen mortgage executed at the same time are to be construed together as one instrument. They constitute an indivisible act. There never was a moment between the seisin and mortgage when La Grange could encumber the estate to the exclusion of the latter, and it follows that a prior mortgage could not insert itself between them. Such a transaction is sometimes illustrated as a conditional sale. Thus, in Stow v. Tifft (15 J. R., 458), which was a

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question between a right to dower and a purchase-money mortgage, Spencer, J., in delivering the opinion, said: "The substance of the conveyance, where land is mortgaged at the same time the deed is given, is this: the bargainer sells the land to the bargainee on condition that he pays the price at the stipulated time, and if he does not, that the bargainer shall be reseized of it free from the mortgage; and whether this contract is contained in one and the same instrument as it may well be, or in distinct instruments executed at the same instant, can make no possible difference."

The same principle was adopted as to the question of escheat (1 Sandf. Ch., 141), and was applied to a defeasance in 3 Wendell, 233, and was recognized and fully approved by this court in 26 New York, 68.

It is not material that it should be regarded technically as a conditional sale; in substance, it is a sale subject to a lien for unpaid purchase-money which attaches *eo instanti,* as a lien as a part of an indivisible transaction. Independent of authority the rule commends itself to every one's sense of justice. A vendor of real estate has no occasion to examine the records for incumbrances created prior to his conveyance. He has the power to protect himself by a qualified or conditional transfer, or by any legal mode of creating a lien to secure himself for unpaid purchase-money. When he conveys and instantly takes a reconveyance as such security, no authority is needed to demonstrate the gross injustice of permitting a prior mortgage from intervening to his prejudice.

If the mortgage is to be deemed executed and delivered subsequently on the fourteenth of April, when it was recorded, the question is, whether it is protected by the recording act. (1 R. S., 756, par. 1), the Bowen mortgage not having been recorded until the seventeenth. The fatal difficulty with this theory is to establish that Seymour was a subsequent purchaser, "in good faith and for a valuable consideration," as the statute requires he should be to be protected against an unrecorded conveyance. The mortgagee must part with value upon the faith of the conveyance. Seymour paid nothing and parted with no value on the fourteenth of April. He parted with his money on the first and second of April. The records then notified him that Bowen had and La Grange had not the title, and, besides Bowen was then in possession, whose rights he was also bound to take notice of. (16 Paige, 388; 15 N. Y., 354; 52 *id.,* 612; 40 *id.,* 314.) He did not part with his money upon an apparent record title or possession. Nor did he part with his money upon the faith of the conveyance, but he parted with it upon the bond of La Grange, and his promise to execute a mortgage and the false representation that he owned, and had a deed of the premises. Assuming the mortgage to have been given on the fourteenth, it was given to secure a precedent debt created on the first and second, and

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for the purpose of this question it might as well have been created six months before.

The law is well settled that, to enable a subsequent purchaser, to invoke the protection of the statute, he must part with value upon the faith of the conveyance. (22 N. Y., 567; 46 Barb., 211, 52 N. Y., 138; 4 Paige, 215; 3 Barb. 270.) If Seymour's mortgage had been canceled the day after it was given, his position would have been precisely the same as it was on the sixth when the Bowen mortgage was given. His position had not been changed, and he had neither paid nor advanced anything after that time. The execution and delivery of the mortgage might well relate back, and be deemed operative from the time the bond was delivered and the money paid; but the payment of the money cannot be transferred, as claimed by the counsel for the plaintiff, to a subsequent occasion, when, if it had been paid, he might have been protected. His situation at the time he paid the money and the inducement then operating, must determine the question. Neither Bowen, nor his assignee, is responsible for, nor should they be prejudiced by, the fraud of La Grange in procuring the money. If Seymour had made inquiry himself he would have ascertained the true facts; but as he parted with his money upon the false statement of La Grange he must bear the consequences.

I am inclined to the opinion that Seymour cannot be regarded as a subsequent purchaser; that the mortgage to him was intended as a present conveyance on the first day of April, and that it remained in the hands of La Grange as a bailee simply. (42 N. Y., 422; 20 Wend., 44; 5 Barn. & C., 671.) The latter could not have interposed his own negligence in putting it on record to prevent its operation; and there is nothing to show but that he intended to make it a valid instrument when he executed and acknowledged it according to his agreement, and the circumstances tend strongly to prove that he did. I prefer, however, to place the decision upon the ground that no value was parted with.

The learned judge, in delivering the opinion at the General Term, held that Seymour was not a subsequent purchaser, and therefore not protected by the recording act, but that his mortgage was entitled to preference by reason of his greater diligence in getting it recorded. He says that both mortgages took effect upon the estate at the same instant. This is true as to time, but they did not take effect upon the same interest or estate. Bowen's mortgage attached to the whole estate, while Seymour's only to the interest which La Grange had, which, as we have seen, was subject to Bowen's mortgage.

Having a lien subordinate to the defendant's mortgage and so situated as to be unable to invoke the protection of the recording act, the circumstance that Seymour procured his mortgage to be

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recorded three days in advance of the other, could not possibly create a preference, and is immaterial. The time of recording had no effect whatever, and the question of diligence has no application to the case. (7 Cow., 360.)

The judgment declaring the priority of Seymour's mortgage cannot be sustained upon any principle of law or equity that I am aware of; and it must be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.[11]

POMEROY, EQUITY, § 681. The equitable doctrine concerning priorities resulting from the presence or absence of notice, or of a valuable consideration or other incident, by which a precedence may be

[11] See also, Ely v. Pingry, 56 Kans. 17; Schoch v. Birdsall, 48 Minn. 441; Boyd v. Mundorf, 30 N. J. Eq. 545; Protection Bldg. Loan Assn. v. Knowles, 54 N. J. Eq. 519; Continental Inv. Loan Co. v. Wood, 168 Ill. 421.

Of course a bona fide purchase intermediate the execution of the deed and the recording of the mortgage may defeat the mortgage by virtue of the recording acts. "The fact that a mortgage is given for purchase money does not place it outside the provisions of the registry act." Jackson v. Reid, 30 Kans. 10. And see Houston v. Houston, 67 Ind. 276.

See also, Ansley v. Pasahro, 22 Nebr. 662.

"Upon the face of the record, the judgment was the prior lien. Title passed to Smith on the 18th. At that time the judgment lien attached. No mortgage was executed or recorded for five days thereafter, so that apparently the judgment was, by five days, a prior lien to the mortgage. The facts giving the mortgage priority [that it was a purchase-money mortgage, to a third person advancing the purchase money] existed only dehors the record. And if the property had been sold upon the judgment, and passed into the hands of bona fide purchasers, they would doubtless have taken the title discharged of the mortgage. It was necessary therefore for plaintiff to take some action to preserve his rights as a prior lien holder. He applied for an order restraining an attempted sale upon execution. * * * If the record had disclosed the fact of the priority of the mortgage lien, doubtless the mortgagee would have no right to interfere with such a sale, for the purchaser, if any one was willing to buy under those circumstances, would be chargeable with notice of the record, and would take the property subject to the mortgage. As the record did not disclose the priority of the mortgage, the mortgagee had a right to interfere and restrain an attempted sale of a full title and interest. * * * While the order should be such as to restrain the sale as threatened, it should be so worded as to leave the judgment creditors free to proceed under the sections cited to a sale of the mortgagor's interest in the property." Brewer, J., in Plumb v. Bay, 18 Kans. 415. As to whether a mortgage bearing the same date as the deed, but not reciting that it was for purchase money, would be considered as sufficient to give notice of its character as a purchase-money mortgage, or to put a purchaser upon inquiry, see Brower v. Witmeyer, 121 Ind. 83; Grant v. Dodge, 43 Maine 489; Smith v. McCarty, 119 Mass. 519.

See Heffron v. Flanigan, 37 Mich. 274.

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given contrary to the mere order of time, applies to conflicting legal and equitable estates or interests in the same subject-matter, and to successive equitable estates, equitable interests such as liens and charges, and mere "equities," meaning thereby purely remedial rights, such as that of cancelation, reformation, and the like; and it applies to no other kind of estates, interests, or rights.

TIFFANY, REAL PROPERTY, § 475. As between interests or claims of a purely equitable character,—that is, enforcible in equity alone,—while, as a general rule, they will be ranked according to the time of accrual, this is by no means always so, equity frequently postponing an earlier to a later claim, the rule being that only as between equal equitable claims, or "equities," as they are usually called, will priority of time give priority of right. Consequently, the equity prior in time may be deferred from considerations of the respective natures of the two equities, as when a mere gift is postponed to a subsequent trust or lien created for a valuable consideration. Likewise, the equity prior in time may be postponed because the person entitled thereto was guilty of fraud or negligence. Finally, a court of equity may, under certain peculiar circumstances, refuse to enforce a claim, though prior in time, as against the holder of a title or claim subsequently obtained, on the ground that the holder of the latter is a "purchaser for value without notice,"—that is, that he obtained his right not only by paying value, but without notice of the prior equity.

While the absence of notice may have the effect of preventing the enforcement of an equity as against the holder of the subsequent equity, courts of equity have also adopted and unfailingly enforced the rule that, if the holder of the subsequent equity, even though he be a purchaser for value, does, at the time of obtaining such equity, have notice of the prior equity, he takes subject thereto.

The equitable rule just referred to, by which one who takes an interest with notice of a prior equity takes subject thereto, is not confined to the case of a purchaser of an equity, but is also applied as against a purchaser of the legal title with notice of a prior equity,—that is, it is a general rule in equity that one who takes an interest with notice of an outstanding adverse interest takes subject thereto.

HARGRAVE AND BUTLER'S NOTES TO COKE UPON LITTLETON, 290b, note 1, xv. If a person has the legal estate or interest of the subject matter in contest, he must necessarily prevail at law over him whose right is only equitable, and therefore not even noticed by the courts of law. This advantage he carries with him, so far, even into a court of equity, that if the equitable claims of the parties are of equal force, equity will leave him who has the legal right in full possession of it, and not do anything to reduce him to an equality with the other, who has the equitable right only.[12]

[12] Compare, Simpson v. Del Hoyo, supra, and cases cited.

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POMEROY, EQUITY, § 738. The protection given to the bona fide purchaser had its origin exclusively in equity, and is based entirely upon the fact that the jurisdiction of equity is ancillary and supplemental to that of the law, and upon the conception that a court of chancery acts solely upon the conscience of litigant parties, by compelling the defendant to do what, and only what, in *foro conscientiae* he is bound to do. If the relations between the two contestants standing before the court of chancery are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the court will interfere and grant the relief; if the relations are not of this character, then the court will withhold its hand, and will leave the parties to the operation of strict legal rules, and to the remedies conferred by the legal tribunals. All equitable principles and doctrines had their origin in this conception, however much it may sometimes be overlooked by courts at present in the administration of the doctrines which have been thus established. The protection given to the bona fide purchaser simply means, therefore, that from the relations subsisting between the two parties, especially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so, and the parties must be left to their pure legal rights, liabilities, and remedies; the court will not aid either against the other. That this is the true rationale is shown by an overwhelming weight of authority. In the vast majority of cases the protection is only given to a defendant, and as a consequence the doctrine itself is commonly spoken of, and ordinarily treated, as essentially a matter of defense. The very few instances in which affirmative relief is granted to the bona fide purchaser are exceptional; they rest upon their special facts, and arise from the fraud of the defendant against whom the relief is awarded.

Ib. § 735. In the United States these elementary notions seem to have been sometimes overlooked, and the courts sometimes seem to have extended the doctrine of bona fide purchase farther than the acknowledged principles of equity would warrant. The tendency is marked and strong in the courts of many states, even when acting as tribunals of law, to make the doctrine a legal rule of property, and to apply it alike to persons who have acquired either a legal or an equitable title to chattels and things in action, as well as to those who have acquired any legal or equitable interest in land. A subsequent holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a subsequent title was necessarily

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the better one. When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a bona fide holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even bona fide purchaser.

Ib. § 736. The most extensive and important change, however, in the United States has been produced by the recording acts. They have extended the doctrine of bona fide purchase to all conveyances and mortgages, and often to executory contracts, and to every instrument which can create, transfer, or affect legal estates or equitable interests, liens, and encumbrances, and have therefore brought it within the cognizance of the courts of law as a rule for determining the validity of legal titles. The greatest diversity is found in the statutory provisions of the various states, and a consequent diversity prevails among the local rules which define the resulting rights of the bona fide purchaser. In some they are conferred upon judgment creditors, upon all purchasers at execution sales, and even upon those who have secured the first record although charged with notice. It would be impossible, within any reasonable limits, to state all the results of these statutes, and to formulate all the special rules which have been derived from them in the different states.

CONSOLIDATED LAWS OF NEW YORK (1909), Chap. 52, Art. 9, § 290. 1. The term "real property," as used in this article, includes lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years.

2. The term "purchaser" includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate.

3. The term "conveyance" includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property.

§ 291. A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly

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certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded.

§ 315. Different sets of books must be provided by the recording officer of each county, for the recording of deeds and mortgages; in one of which sets he must record all conveyances and other instruments absolute in their terms delivered to him, pursuant to law, to be so recorded, which are not intended as mortgages, or securities in the nature of mortgages, and in the other set, such mortgages and securities delivered to him.

REVISED STATUTES OF ILLINOIS (1912, Hurd), Chap. 30, § 28. Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, shall be recorded in the county in which such real estate is situated; but if such county is not organized, then in the county to which such unorganized county is attached for judicial purposes.

§ 30. All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record.

§ 31. Deeds, mortgages and other instruments of writing relating to real estate shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proved according to law; but the same shall not be read as evidence, unless their execution be proved in the manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof.

REVISED LAWS OF MASSACHUSETTS (1902), Chap. 127, § 4. A conveyance of an estate in fee simple, fee tail or for life, or a lease for more than seven years from the making thereof, shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it, or an office copy as provided in section fifteen of chapter twenty-two, is recorded in the registry of deeds for the county or district in which the land to which it relates is situated.

GENERAL CODE OF OHIO (1910) § 8542. All mortgages, executed

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agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the mortgaged premises are situated, and take effect from the time they are delivered to the recorder of the proper county for record. If two or more mortgages are presented for record on the same day, they shall take effect from the order of presentation for record. The first presented must be the first recorded, and the first recorded shall have preference.

§ 8543. All other deeds and instruments of writing for the conveyance or incumbrance of lands, tenements, or hereditaments, executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such former deed or instrument.[13]

BACON v. VAN SCHOONHOVEN.

COURT OF APPEALS OF NEW YORK, 1882.
87 N. Y. 446.

RAPALLO, J. On the 4th of February, 1876, Grodus W. Smith, then being sole owner of the premises in question, mortgaged them to the defendant Van Schoonhoven, to secure a loan of $3,800, made by him at the time. Before consummating the loan Van Schoonhoven examined the title and found on record a mortgage for $3,500, on the same premises, made by Grodus W. Smith and Samuel W. Smith, to Matthew Owen, dated October 10, and recorded October 13, 1866, of which he required said Smith to procure a satisfaction before completing the loan. No assignment of that mortgage appeared upon record, and Van Schoonhoven had no notice or knowledge of any assignment thereof, or that any person other than Owen had any interest therein. On the 4th day of February, 1876, Smith delivered to Van Schoonhoven his said mortgage for $3,800, and at the same time produced and delivered to him a satisfaction piece of the Owen mortgage, executed by said Matthew Owen, and acknowledged so as to entitle it to be recorded, and Van Schoonhoven thereupon advanced the $3,800. On the 9th of February, 1876, and before any assignment of the Owen mortgage had been put on record, Van Schoonhoven caused his own mortgage and said satisfaction-piece to be recorded.

It now appears that the Owen mortgage had been assigned by

[13] The following cases deal only with a few of the applications of the recording acts to mortgages. For a brief general treatment of these statutes, see Tiffany, Real Property, Chap. XXXI.

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Owen to William C. Smith, in 1867, and by the latter to the plaintiff, in 1868, but that neither of these assignments was recorded until February 9, 1877, one year after the satisfaction-piece and the mortgage to Van Schoonhoven had been recorded. The plaintiff brought this action to foreclose the said Owen mortgage, upon which there is still due and unpaid $1,000, with interest from Oct. 1, 1877, and she claims priority over the mortgage to Van Schoonhoven. The satisfaction-piece was procured by Smith from Owen about February 4, 1876, by the false representation that the mortgage had been paid. No payment was made to Owen at the time of the execution of the satisfaction-piece. Van Schoonhoven loaned the $3,800, believing the fact to be that the Owen mortgage had never been assigned, and that it was fully paid and satisfied so as to be discharged of record. It was not produced by Smith at the time of the loan, but was at that time owned by the plaintiff. All these facts appear from the findings of the trial judge. It is beyond question upon these findings that Van Schoonhoven advanced his money upon the faith of the satisfaction-piece and of his mortgage, and that he stands in the position of a bona fide purchaser of the mortgaged premises, within the provisions of the Recording Act. (1 R. S. 756, sec. 1, 37, 38.)

His conveyance was also recorded before those under which the plaintiff claims. The term "conveyance" as used in the act, must be construed to embrace "every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity," except, etc. The conveyances under which the defendant claims are the satisfaction-piece and the mortgage for $3,800. Together they create a lien on the land in his favor, free from the Owen mortgage. Van Schoonhoven's mortgage is a conveyance, within the express terms of the act, and we think that the satisfaction-piece also comes within the statutory definition. It is an instrument by which the title to the land may be affected in law or equity. It purports to discharge the land from the lien of the Owen mortgage, and it does so effectually, if the assignments of that mortgage are void as against Van Schoonhoven by reason of their not having been recorded. It is equivalent to a release of the mortgaged premises. Instruments creating liens by way of mortgage, being expressly declared to be embraced, for the purposes of this act, in the term "conveyance," it is difficult to conceive any reason why instruments discharging such liens should not be included in the general definition of "instruments by which any estate or interest in land may be affected in law or equity."

The assignments of the Owen mortgage are also conveyances within the act. This is well settled by authority, and such assignments, if not recorded, are void, not merely as against subsequent

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purchasers of the same mortgage, but also as against subsequent purchasers of the mortgaged premises, whose interests may be affected by such assignments, and whose conveyances are first recorded. (Decker v. Boice, 83 N. Y. 215; Westbrook v. Gleason, 79 *id.* 23. See, also, Viele v. Judson, 82 *id.* 32.) And we see no escape from the conclusion, that under the provisions of the act they were void as to the defendant Van Schoonhoven.

It must be conceded, that under the decisions in Ely v. Scofield (35 Barb. 330), and in Van Keuren v. Corkin (66 N. Y. 77), where the doctrine of the case last cited was affirmed, the plaintiff's mortgage would be deemed discharged as to the defendant Van Schoonhoven, if the satisfaction-piece had been recorded before he advanced his money and took his mortgage. We do not think that there is any substantial distinction depending upon that circumstance. The defendant advanced his money on the faith of an instrument which he was entitled, and had the power, to put on record, and which, as the record then stood, was effectual to discharge the mortgage. The law provided that every other instrument which might affect the title, and which was not recorded, and of which he had no notice, would be void as against him, provided he got his papers on record first. Extreme caution might have dictated that he should have all his papers recorded before he advanced his money, but it is not always in the power of a party to exercise this degree of caution; he cannot usually obtain possession of the papers until he has paid the consideration, and he has to run the hazard, as a general rule, of some other instrument getting on record before his; but this is the only hazard which he incurs, if the record is right when he receives his papers; and if he succeeds in recording them before anything else intervenes, he is entitled to the protection of the Recording Act to the same extent as if he had recorded his papers before advancing his money.

It is further contended, that the defendant is not a bona fide purchaser, because the Owen bond and mortgage were not produced by Smith when he delivered the satisfaction-piece, and the case of Brown v. Blydenburgh (7 N. Y. 141) and Kellogg v. Smith (26 *id.* 20) are relied upon as authority for this position. The first case cited holds that where a mortgagor pays or satisfies the mortgage debt by a dealing between himself and the mortgagee, ordinary caution requires him to obtain the surrender of his bond, and the fact that the mortgagee does not produce it is a circumstance which should put the mortgagor on inquiry. The second case holds the same rule with reference to one who takes an assignment of a bond and mortgage, without receiving the instrument which he purchases. In neither of these cases was the effect of the Recording Act considered, but the cases are not applicable to the present one. One who takes a conveyance or mortgage of real estate, relying upon the

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satisfaction of a prior mortgage made by a third party, has no occasion to call for the production of the mortgage which has been satisfied, or of the bond. He is neither the debtor, who should see that his own obligation is canceled when he pays the debt, nor is he the purchaser of the obligation, who should obtain possession of the securities which he purchases. He has no right to the possession of the canceled instrument, and no occasion for it, and it cannot be that he is bound to suspect a fraud, when he sees that the mortgage has been satisfied by the party who stands upon the record as its owner and entitled to satisfy it.

There is another question in the case relating to the mortgage called the Carpenter mortgage. This mortgage was prior to the mortgage to Van Schoonhoven, but subsequent to the Owen mortgage. Van Schoonhoven purchased and took an assignment of the Carpenter mortgage in December, 1877, but before that time, viz., in February, 1877, the plaintiff's assignment of the Owen mortgage had been put on record. When he purchased the Carpenter mortgage, therefore, he had constructive notice of the plaintiff's rights, her assignment then being on record, and the unauthorized satisfaction of the Owen mortgage cannot avail Van Schoonhoven any more than it would have availed Carpenter to give the Carpenter mortgage priority over the Owen mortgage. The Carpenter mortgage must stand in the same position which it would have occupied if not assigned, and must be paid in the same order.

The order of the General Term should be affirmed, and judgment absolute rendered against the plaintiff, in favor of the defendant Van Schoonhoven, pursuant to her stipulation, with costs.

All concur.

Order affirmed, and judgment accordingly.[14]

[14] See also, Havighorst v. Bowen, 214 Ill. 90; Connecticut Mut. Life Ins. Co. v. Talbot, 113 Ind. 373; Bullock v. Pock, 57 Nebr. 781; Huitink v. Thompson, 95 Minn. 392; Swasey v. Emerson, 168 Mass. 118; Swartz v. Leist, 13 Ohio St. 419; Henderson v. Pilgrim, 22 Tex. 464; Porter v. Ouarada, 51 Nebr. 510; Henniges v. Paschke, 9 N. Dak. 489; Marling v. Nommensen, 127 Wis. 363; Williams v. Jackson, 107 U. S. 478. The following cases, contra to the principal case, were decided on the ground that the statutes did not require the recording of an assignment of a mortgage: Reeves v. Hayes, 95 Ind. 521 (before the statute of 1877); DeMuth v. Old Town Bank, 85 Md. 315; Bartlett v. Eddy, 49 Mo. App. 32; Watson v. Dundee Co., 12 Ore. 174 (quoted ante, Chap. V, note 12); Howard v. Shaw, 10 Wash. 151. See Chap. V, note 9.

If the statute declares the unrecorded conveyance void as against a subsequent purchaser, "whose conveyance is first duly recorded," the assignee will prevail over the subsequent purchaser, though his assignment is not recorded until after the subsequent purchase, if the assignment is recorded before the conveyance to the purchaser is recorded. Ely v. Scofield, 35 Bart. (N. Y.) 330. Fallass v. Pierce, 30 Wis. 443. The effect of the latter case was, however, substantially modified by the case of Marling v. Nommensen, 127 Wis . 363, holding that the assignee was estopped to assert his mortgage against the purchaser

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PORTER v. OURADA.

SUPREME COURT OF NEBRASKA, 1897.
51 Nebr. 510.

RAGAN, C. This is an appeal by Henry M. Porter from a decree of the district court of Colfax county dismissing his suit brought to foreclose a real estate mortgage.

There is little, if any, conflict in the evidence. The material facts are as follows: In January, 1887, Adam Ourada owned certain real estate in Colfax county. On the 31st day of January of said year, Ourada became indebted to one C. H. Toncray in the sum of $850. As an evidence of said debt Ourada and his wife executed and delivered to Toncray a note for said sum of money, payable to the order of said Toncray at a bank in Fremont, Nebraska, where Toncray resided. This note matured on the 1st day of February, 1892, and drew interest at the rate of seven per cent. per annum from February 1, 1887, until maturity, such interest payable semi-annually and evidenced by ten interest notes or coupons of $29.75 attached thereto, each payable to Toncray and at the same place of payment as the principal note. The principal bond and the coupons were secured by a real estate mortgage executed by Ourada and wife on the 31st day of January, 1887, and duly recorded in the office of the register of deeds of said Colfax county on the 8th day of February, 1887. Soon after the recording of this mortgage Toncray sold, indorsed, and delivered in the usual course of business the principal note and interest notes to Henry M. Porter and delivered to him the mortgage securing the same. It does not appear that Toncray ever executed any formal assignment in writing of the mortgage securing these notes; at all events, if such an assignment was executed, it was never filed of record in the office of the register of deeds of Colfax county. Until May, 1890, Ourada appears to have made his interest payments as they matured to Toncray, and he appears to have remitted them to Porter's agent. In May, 1890, Ourada made application to the appellee, the Central Loan & Trust Company (hereinafter called the trust company), for a loan upon this land. The trust company agreed to and did make Ourada a loan of $1,700, and to secure the same took a mortgage from Ourada and wife upon this land. By agreement betwen Ourada and the trust company the latter, instead of paying to Ourada the $1,700, undertook therewith to pay off and discharge all liens upon

who had relied on the state of the record. The doctrine of estoppel, as well as the recording acts, was relied on in Bullock v. Pock and Henniges v. Paschke, supra.

Compare with the principal case, Brewster v. Carnes, 103 N. Y. 556; Robbins v. Larson, 69 Minn. 436.

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the land prior to its own mortgage. It paid off several liens on the land and paid to Toncray the principal of his loan, $850, not due until February, 1892, and paid the matured interest thereon, and caused Toncray to release his mortgage. It appears that Toncray failed to remit this money to Porter, who then owned and held the Toncray mortgage and the debt which it was given to secure. At the time the trust company took its $1,700 mortgage from Ourada, it caused an abstract of title to be made of the property on which abstract appeared the mortgage made by Ourada to Toncray. When the trust company made the payment to Toncray it had no knowledge or notice of the fact that Porter then owned and held the debt which such mortgage was given to secure. In April, 1891, the appellee, John Stibal, purchased of Ourada and wife the real estate in controversy here, paid a valuable consideration for the same, and in his deed assumed and agreed to pay the $1,700 mortgage held by the trust company, it then being of record in Colfax county. Before Stibal purchased the land he caused the public records of Colfax county to be examined, and they disclosed the mortgage made by Ourada and wife to Toncray, the release of that mortgage by Toncray, and the $1,700 mortgage made by Ourada and wife in May, 1890, to the trust company. Stibal, at the time he purchased the land, had neither actual nor constructive notice that Porter owned or had ever owned the debt secured by the Toncray mortgage, and he purchased the land of Ourada believing that said mortgage had been paid in full and rightfully discharged of record. On the 15th day of December, 1892, Henry M. Porter brought this suit in the district court of Colfax county to foreclose the mortgage which had been transferred to him by Toncray, making the trust company and Stibal, among others, defendants to the action. Stibal answered alleging that he was the owner of the real estate; that he purchased it for a valuable consideration, relying upon the notice afforded by the records of Colfax county that the mortgage sought to be foreclosed by Porter had been paid and released. The trust company answered, claiming also to be an innocent mortgagee of the property, and prayed for the foreclosure of its mortgage, and that it might be declared a first lien upon the real estate.

In view of these established facts, What are the rights, liabilities, and equities of Porter, the trust company, and Stibal? Stibal, having purchased and paid for this real estate a valuable consideration after the entry of the satisfaction of the mortgage by Toncray, the original mortgagee, without notice, actual or constructive, that the Toncray mortgage had been assigned and remained unpaid, and that the release thereof was unauthorized, he is entitled to protection as against the Toncray mortgage now sought to be foreclosed by Porter. (Whipple v. Fowler, 41 Neb., 675.) The principle upon which that case rests is that where one of two innocent parties must suffer a

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loss, he whose negligence caused the injury should bear it. Although Porter is an innocent holder of the debt and mortgage, yet he might have protected himself by taking a formal assignment in writing from Toncray of the mortgage purchased by him and caused it to be recorded in the office of the register of deeds of Colfax county. (Eggert v. Beyer, 43 Neb., 711.) And if his neglect to do this has caused the loss which either he or Stibal must bear, then, as between those two parties, the loss should fall on Porter. Stibal's title, then, to the real estate in controversy, so far as this record discloses, is subject only to the lien of the mortgage of the trust company. The trust company is not an innocent mortgagee of the real estate in question. At the time it took its mortgage the Toncray mortgage stood of record and the debt which it secured had two years to run. By the agreement with Ourada the trust company was to pay off the Toncray mortgage out of the loan it had made to Ourada. It paid this mortgage to Toncray, but Toncray had no authority to receive such payment. He did not own the paper, nor was it in his possession, nor was he Porter's agent for the collection of this mortgage debt. The mere fact that Toncray had been in the habit of collecting from Ourada interest and remitting it is not alone sufficient to authorize the inference or conclusion that his agency was such as to authorize him to collect the entire unmatured mortgage debt. (Stark v. Olson, 44 Neb. 646; Richards v. Waller, 49 Neb., 639.) When the trust company paid the mortgage to Toncray it knew, or must have known, from the records that the mortgage secured a debt evidenced by negotiable paper, and it paid this debt to Toncray at its peril without receiving from him at the time the surrender of the negotiable notes. (Eggert v. Beyer, 43 Neb., 711.) The promise made by the trust company to Ourada to pay the Toncray mortgage was a promise made to Ourada for the benefit of the legal owner and holder of the debt secured by the Toncray mortgage, and the mortgage of the trust company upon this land should be charged with the amount due Porter on the Toncray mortgage; in other words, Porter is entitled to be subrogated to the lien which the trust company has on this land to the extent of the amount due and unpaid on the mortgage purchased of Toncray.

The decree appealed from is reversed and the cause remanded to the district court with instructions (1) to take an account of the amount due Porter on the Toncray mortgage; (2) the amount due the trust company on its mortgage, and to enter a decree giving Porter a first lien upon the premises for the amount due upon his mortgage, and to give the trust company a second lien for the amount found due on its mortgage, after deducting from such amount the amount found due Porter, the costs in this entire proceeding to be

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taxed to the trust company and Porter in such proportion as the district court may deem just.

Reversed and remanded.[15]

CURTIS v. MOORE.

COURT OF APPEALS OF NEW YORK, 1897.
152 N. Y. 159.

VANN, J. On the nineteenth of October, 1885, Edward S. Curtis conveyed an undivided one-sixth interest in certain premises situate in the city of New York, to John B. Armstrong by a deed dated that day and duly recorded October 26, 1885. At the same time the said Armstrong executed a purchase-money mortgage to Edward S. Curtis to secure a note for $2,000, given by the former to the order of the latter, of even date with the mortgage, and payable two years thereafter with interest at six per cent. This mortgage was duly recorded November 24th, 1885. March 29th, 1886, said Edward S. Curtis borrowed the sum of $500 of the plaintiff, and delivered to him the said note and mortgage, and gave him an instrument of which the following is a copy: "$500. Chicago, Ill., Mar. 29, 1886. One day after date, for value received, I promise to pay to the order of DeWitt H. Curtis the sum of five hundred dollars, at Chicago, with interest at the rate of 8 per cent. per annum after date, having deposited with said D. H. Curtis, as collateral security, a certain real estate mortgage for the sum of two thousand dollars, bearing date of 19th October, 1885, given to E. S. Curtis by J. B. Armstrong & Desire D., his wife, which I hereby give the said D. H. Curtis, agent or assignee, authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter, or before, in the event of said securities depreciating in value in the opinion of said D. H. Curtis, at public or private sale, at the discretion of said D. H. Curtis or his assignee, without advertising the same, or demanding payment, or giving me any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said mortgage, including attorney's fees, and in case the proceeds of the sale of the said mortgage shall not cover the principal, interest and expenses, I promise to pay the deficiency forthwith after such sale.

"Edward S. Curtis."

[15] See also, Keohane v. Smith, 97 Ill. 156; Jenks v. Shaw, 99 Iowa 604; Lewis v. Kirk, 28 Kans. 497; Wolcott v. Winchester, 15 Gray (Mass.) 461.

Compare, Vann v. Marbury, 100 Ala. 438; VanKeuren v. Corkins, 66 N. Y. 77.

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On May 20th, 1886, Edward S. Curtis borrowed from the plaintiff $500, on the same security as collateral, and on August 25th in the same year, he borrowed $500 more, each time giving him an instrument similar in form to that of March 29, 1886, but none of them were acknowledged or recorded. February 7, 1887, said Armstrong conveyed the premises covered by the mortgage to Edward S. Curtis by deed duly recorded on the 5th of March, following. On the 23d of February, 1891, Edward S. Curtis, for a valuable consideration, conveyed the premises to the defendant J. Charles Moore, by deed duly recorded on the 11th of April thereafter.

This action was brought to foreclose said mortgage, and the defendant Moore alleges in defense that he is a bona fide purchaser of the premises in question without notice, and that the conveyance from Armstrong to Edward S. Curtis effected a merger of the mortgage. Upon the trial it did not appear that Mr. Moore purchased the premises either with or without actual knowledge of the outstanding mortgage and note given by Mr. Armstrong and transferred to the plaintiff. He is presumed, however, to have had notice of such facts, as an examination of the record would have disclosed.

Under the circumstances above stated, the plaintiff became the owner of the mortgage for the purpose for which it was delivered or pledged to him, as "a good assignment of a mortgage is made by delivery only." (Fryer v. Rockefeller, 63 N. Y. 268-276; Runyan v. Merserau, 11 Johns, 534; Green v. Hart, 1 Johns, 586.) If the omission of the plaintiff to record the evidence of the transfer of the mortgage to him inured to the benefit of the defendant under the Recording Act, we may assume that the latter became a bona fide purchaser without notice, otherwise not. In Purdy v. Huntington (42 N. Y. 334) the question was directly passed upon by this court and decided adversely to the contention of the defendant. It was held in that case that the assignee of a recorded mortgage upon real estate, which was conveyed by the mortgagor to the mortgagee after an assignment of the mortgage, has a valid lien as against a purchaser from the mortgagee who took without notice of the assignment, notwithstanding the conveyance to the mortgagee, as well as the conveyance from the mortgagee to the purchaser, were recorded before the assignment was placed upon record. The court said: "The question is then presented, whether Calvin Huntington can be protected in his title as against the mortgage by reason of the omission to have the assignment thereof recorded. It is conceded that he is to be charged with constructive notice of the existence of the mortgage, and of the continuance of its lien, by its record in the proper office. By that he was informed not only of the date of the mortgage, the amount secured thereby, and of all its particulars, but

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that it was open and uncanceled of record, and therefore apparently an outstanding lien and incumbrance on the premises of which he was taking title. Having that information, he knew or was at least chargeable in law with the further notice, that it was such lien and incumbrance in the hands of any person to whom it had been legally transferred, and that the record of such transfer was not necessary to its validity, nor as a protection against a purchaser of the property mortgaged or any other person than a subsequent purchaser in good faith of the mortgage itself or the bond or debt secured thereby; but on the contrary, that a vendee of the premises took it subject to the lien of the mortgage irrespective of the ownership thereof. That knowledge and notice made it his duty in the exercise of proper diligence to inquire whether Minott Mitchell, his vendor, was still the owner and holder of the mortgage, and his omission to make that inquiry deprives him of the protection of a bona fide purchaser." (Citing Brown v. Blydenburgh, 7 N. Y. 141; Kellogg v. Smith, 26 N. Y. 18; Gillig v. Maass, 28 N. Y. 191; Campbell v. Vedder, 3 Keyes, 174.) The same principle was laid down in an earlier case, where the court said: "The failure to record an assignment of the prior mortgage could not blot out the record of the mortgage itself. If Van Vranken was the purchaser, in good faith, of the prior mortgage, and an assignment thereof, previously made, had not been recorded, he would hold the mortgage. But, if he only became the purchaser of the premises by absolute deed, or otherwise, the record of a prior mortgage is sufficient notice thereof to him, no matter how often assigned, or whether the assignment be recorded or not. The only alteration made by the Recording Act of 1830, is, that an assignment must now be recorded as against a subsequent bona fide purchaser of the mortgage assigned. A 'subsequent purchaser in good faith,' in the Recording Act, as to this case, means a purchaser of the mortgage assigned, not a purchaser of the premises. A subsequent purchaser of the premises is bound by a prior recorded mortgage, no matter who holds it." (Campbell v. Vedder, 1 Abb. Ct. of App. Dec. 295, 302; S. C., 3 Keyes, 174.)

It is obvious that these cases are analogous to the case before us. Mr. Moore was not a bona fide purchaser within the principle established by those authorities, because the record of the mortgage was notice to him that the mortgage was outstanding and unsatisfied, and it was no concern of his who happened to be the owner at the time. In dealing with the property on the assumption that Edward S. Curtis still owned the mortgage, he acted at his peril and assumed the risk that Curtis might have transferred the mortgage to some one else. He was put upon his inquiry, and it was not enough for him to examine the record and see that no assignment of the mortgage appeared thereon, but he should have required a satisfaction-piece in due form or the delivery of the mortgage and note.

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The case of Bacon v. Van Schoonhoven (87 N. Y. 446) is not in conflict with the cases cited above. In that case the mortgagee advanced money in reliance upon a satisfaction-piece executed by the mortgagee in a former mortgage, which had been duly recorded and in fact had been assigned, but the assignment was not recorded. The court held that the satisfaction-piece was a conveyance within the meaning of the Recording Act, and that whoever advanced money to be secured by a bond and mortgage upon the faith of such an instrument was a bona fide purchaser within the provisions of the act. This was the question before the court, and all that was decided that bears upon the subject now before us, although language somewhat broader in its application was used in the opinion. Although both Purdy v. Huntington and Campbell v. Vedder were cited by counsel upon the argument, neither is referred to in the opinion, and it is clear that the court did not intend to overrule them. If Edward S. Curtis had given a satisfaction-piece of the mortgage standing on the record in his name, the case relied upon by the defendant would be applicable. He did not do this, however, but accepted title with constructive notice of an uncanceled mortgage, recorded and outstanding, without making inquiry or requiring the production of the mortgage itself, or the note that it was given to secure. Under these circumstances, he cannot be held a bona fide purchaser as against the mortgage assigned to the plaintiff, because it is not necessary to record an assignment of a recorded mortgage as against a subsequent purchaser of the mortgaged premises, but only as against a subsequent purchaser of the mortgage itself. (Purdy v. Huntington, *supra;* Campbell v. Vedder, *supra;* Miller v. Lindsey, 19 Hun, 207.)

There was no merger because the ownership of the mortgage, with the debt secured thereby, and the title to the land, did not meet in the same person. When the fee came back to Edward S. Curtis he had no title to the mortgage, for he had assigned it some months before. There can be no merger, at law, without a union of titles in the same person; nor, in equity, unless, also, there is an intention on the part of those concerned in the transaction that it should operate as a merger. In this case both the union and the intention were wanting. (Purdy v. Huntington, *supra;* Smith v. Roberts, 91 N. Y. 470; Sheldon v. Edwards, 35 N. Y. 279, 284; Bascom v. Smith, 34 N. Y. 320.)

The defendant offered to show an agreement between said Armstrong and Edward S. Curtis, bearing the same date as the mortgage, which recited the conveyance of the property by Curtis to Armstrong, and provided for its reconveyance by Armstrong to Curtis. It contained a stipulation that Armstrong "has no beneficial interest in the above-described property, but holds it subject to a trust." This agreement was immaterial, and was properly excluded

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on that account. The plaintiff knew nothing of it and was not a party to it. Armstrong's title came from Curtis, and the plaintiff could not be affected by a secret agreement between them that the former should hold the premises in trust for the latter, when, according to the record, he held it in fee at the time the mortgage was executed, and the mortgage contained the recital that it was given to secure the payment of a part of the purchase money. Moreover, the plaintiff has the interest of both the trustee and the *cestui que* trust, for the one executed while the other assigned the mortgage.

After examining all of the exceptions, we think the judgment was right and that it should be affirmed, with costs.

All concur.

Judgment affirmed.[16]

AMES v. MILLER.

SUPREME COURT OF NEBRASKA, 1902.
65 Nebr. 204.

HOLCOMB, J. From findings and a decree adverse to him the plaintiff in the court below appeals his cause to this court. In the controversy is involved the question of conflicting rights and interests, as between the plaintiff, who is the transferee before maturity of a negotiable promissory note secured by a mortgage on real estate, the lien of which he is seeking by this action to enforce, and the appellee, Wolcott, who claims such real estate as a bona-fide purchaser for value divested of any lien asserted by plaintiff arising by virtue of the provisions of the mortgage he holds. While other questions are presented for our consideration by appellee which he claims preclude a recovery by the plaintiff, we think there is but one question of a decisive character upon which the decree of the trial court can be upheld, and if upon consideration that should be resolved in favor of the appellant, then his right to the relief asked is fully established, and the decree from which he appeals must be reversed and vacated. The decisive question is whether, in so far as it affects the rights of the appellee, there has been a merger of the legal and equitable estate in the land coverd by the mortgage, in the grantor of the appellee Wolcott in such a way as to give to Wolcott, under his conveyance from such grantor, the full estate in the

[16] See also, Edgerton v. Young, 43 Ill. 464; Wilson v. Campbell, 110 Mich. 580; Peterborough Sav. Bank v. Pierce, 54 Nebr. 712; Pratt v. Bank of Bennington, 10 Vt. 293; Aiken v. St. Paul R. Co., 37 Wis. 469; Oregon Trust Inv. Co. v. Shaw, 5 Sawy. (U. S.) 336.

Compare, Ogle v. Turpin, 102 Ill. 148; Bank of Indiana v. Anderson, 14 Iowa 544; Bowling v. Cook, 39 Iowa 200.

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land and unaffected by the mortgage lien theretofore existing thereon. We assume that the plaintiff became the owner and holder of the note and mortgage before the maturity of the debt and is entitled to all the protection accorded to the holder of such paper, qualified, however, by any loss of right which he may have sustained by reason of his failure and neglect to record an assignment of the mortgage to him showing his interest in the land by virtue of the mortgage and the assignment thereof, which it is conceded was never done. So far as disclosed by the record, the estate and interest in the land created by the mortgage remained in the original mortgagee in whose favor the instrument was executed. The appellee Wolcott's rights are based substantially on the following facts, as disclosed by the record: After the execution and delivery of the note and mortgage under which plaintiff claims, and after their transfer to him or his immediate assignor, a judgment was obtained against the owner of the legal title to the land, who had purchased from the mortgagor, on which execution was issued, and levied by the sheriff on the mortgaged land. In making the appraisement for the purpose of sale under the levy of the execution, there was deducted the amount of the mortgage debt and some other recorded incumbrances against the land. After appraisement and due advertisement, the land was offered for sale and sold to one B. A. Gibson, to whom the mortgage was originally given under which plaintiff, as assignee, now claims. Soon after the confirmation of sale and the execution of the sheriff's deed to the purchaser, Gibson, negotiations were entered into through an agent for the sale of the property to the appellee Wolcott, who, in pursuance of such negotiations, became the purchaser of the property. It is indisputably established by the record that in the purchase of the land, Wolcott acted in the best of faith, and paid full value for the property, believing he was securing title thereto divested of the lien of the mortgage which appeared of record as being in favor of his grantor, Gibson. The note at this time was long past due. At the time of the purchase, Wolcott made inquiry as to the status of the mortgage, and was assured by Gibson that, "as he had the sheriff's deed to the property and was the owner of the mortgage, he had all there was in the property and his warranty was good." An attorney present at the time the negotiations were closed also gave the purchaser advice substantially corroborating the views of Gibson to the effect that a deed executed by Gibson under the circumstances would convey to him title clear of the apparent incumbrance by virtue of the mortgage existing thereon. It is altogether clear that Wolcott, in purchasing the land and paying full value therefor, relied on the then state of the public records of the county affecting conveyances of real estate or interests therein, and, they disclosing that his grantor was the owner of the mortgage estate, and having acquired, through the execution sale, the legal

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title also, that he might safely deal with him as one having the entire estate in and to the land which he was purchasing, and that he consummated the purchase in that belief. Under such circumstances may it rightfully be said that as to the purchaser, Wolcott, there was a merger of the two estates in his grantor, and he therefore obtained title to the property divested of the lien which the plaintiff is seeking to enforce? It is urged by counsel for appellant that there can be no union of the two estates, because, when Gibson purchased under the execution and obtained legal title to the property, he was not in fact the owner of the mortgage before executed and delivered to him, but which he had, prior to obtaining the legal estae, transferred to others. But in dealing with registry acts which are enacted into law expressly for the protection of those who, in good faith, deal and engage in a business transaction with reference to real estate, relying on the public records, of which constructive notice is always imputed, the rights of the parties are adjusted and determined, not from the concrete fact of ownership, but from the record title, on which they may safely rely when acting in good faith and without notice of the true conditions of affairs. We meet with innumerable instances where actual owners of substantial interests in real estate acquired by them in good faith and for value lose such interest because not complying with the registry laws, or by failing to take notice of the state of the record, of which the law says knowledge will be imputed even though actual personal notice is wanting. By the provisions of section 16, chapter 73, of the Compiled Statutes, deeds, mortgages and other instruments required to be recorded are void as to subsequent purchasers without notice whose deed, mortgages or other instruments shall be first recorded. And by section 46, the term "deed" is construed to embrace every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and leases for one year or for a less time. It can hardly be doubted that an assignment of a mortgage comes within the purview of section 46, and a failure to record the same by the person claiming rights thereunder will, in many instances, deprive such assignee of any right to enforce a lien arising by virtue of a mortgage, and the assignment thereof, as against a subsequent purchaser in good faith, who has relied upon the public records, and thereby acquired a better title or superior equity in and to such property. The scope and purpose of a statute providing for the recording of instruments affecting the title to real estate and the rights of parties claiming under its provisions is forcibly illustrated in the case of bona fide purchasers of real estate who rely on a record disclosing release of a mortgage lien executed by the mortgagee or an assignee of record of the mortgagee, and who apparently is the owner,

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and has authority to release such instrument, although at the time, actually and in fact having no interest in the property by virtue of the released instrument, because previously thereto such party had sold and transferred all his interest to some third person of whom the record gives no information or notice. Whipple v. Fowler, 41 Nebr., 675; Cram v. Cotrell, 48 Nebr., 646; Porter v. Ourada, 51 Nebr., 510.

"Ordinarily," it is said, "when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter." Wyatt-Bullard Lumber Co. v. Bourke, 55 Nebr., 9. If this proposition of law is correct and has any practical value, if it means anything when a record discloses that two unequal estates have apparently coalesced and all the facts and circumstances so far as known strengthen and confirm the inferences to be drawn from the record, and the person in whom the two estates of record have joined so treat his title, then, in principle, can there be any distinction as to the rights of a bona fide purchaser relying on such record and the expressed intention of the party in whom such estates have joined, who is his grantor, and the purchasers of property relying on a release of a mortgage by one having the apparent authority to make such release, as in the several cases just cited? If from the state of public record and the facts surrounding the transaction by which the appellee acquired title he was justified in dealing with his grantor as though he had acquired the entire estate by reason of the mortgage and legal title having become merged, then as to such bona fide purchaser the mortgage estate was destroyed, and he became the owner of the property divested of the mortgage lien in favor of some third party, who was a stranger to the record. It seems to us that in principle, and for reasons just as convincing, his purchase would give him as good title as would be the case were the mortgage released by the mortgagee and apparent owner prior to the purchase, and the appellee became a buyer in good faith, relying on a record which disclosed a release of the mortgage lien by one apparently holding the legal title thereto, and having the right and authority to execute such release. In the one instance a prospective purchaser examines the public records, and finds that, although a mortgage incumbrance had existed on the property, it had been released and discharged by one, so far as the record disclosed, who was the owner, and authorized to enter satisfaction thereof; and that his grantor was possessed of a perfect title, which he, as purchaser, could safely rely on. In the other, the record and surrounding circumstances disclosed that the grantor of the prospective buyer was possessed of the entire estate in the property he was contemplating purchasing; that the mortgage and legal estate had become merged, and that the seller had authority to convey all the title and estate he assumed to own and to be able to convey. The two purchasers would, on

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principle, stand on an equality, and be entitled to equal protection when their title to the property was assailed by one having an actual interest therein, evidenced by an instrument not recorded, and of which the purchasers were without knowledge or notice. The record discloses, at least presumptively, a merger of the two titles. The whole transaction was and is consistent with an intention on the part of the purchaser, Gibson, to have the two estates coalesce. He did not assume or agree to pay the mortgage debt when he took by purchase at execution sale the estate of the execution debtor. He purchased the equity of redemption, obtained the legal title and the entire interest in the property remaining after the amount of the mortgage lien had been deducted from the appraised value of the land. It is true he paid only a nominal consideration ($1), but this, in view of the confirmation of the sale, may be presumed to be all the property was worth over and above the mortgage interest therein and other incumbrances thereon. He became a purchaser of all the estate held by the execution debtor, as much so as if he had received from him a warranty deed wherein was excepted in his covenants the incumbrances deducted by the appraisers in making the appraisement, or as would have been the case had the judgment debtor conveyed by quit-claim deed all of his interest, right and title in and to the property. He was, according to the record, the owner of the mortgage and the estate created thereby, and by the purchase at execution sale of all the remainder of the estate, and the two estates thereby centering in the one person with no intervening rights, ordinarily they will be merged into the greater. While this rule is not without its exceptions, as where an intention to the contrary is expressed or may be implied or inferred, it is to be borne in mind in this case every fact and circumstance shows an intention on the part of the appellee's grantor that the two estates should merge, and that upon inquiry by the appellee Wolcott, out of an abundance of caution, he was expressly advised by his grantor that the two estates had joined, and that by the deed then to be executed the entire estate would be conveyed to him. It is quite obvious that as to appellee's grantor, after professing to convey the entire estate to his grantee, and executing an instrument to that effect, this would be conclusive on the question of merger, and no intention to keep the estates separate could be inferred, but on the contrary, the merger would be held irrevocably to have taken place. James v. Morey, 2 Cowen (N. Y.), 246. As to whether or not a merger was intended, certainly the appelle had made all the inquiries it was possible for him to make, and brought himself within the rule stated in Peterborough Savings Bank v. Pierce, 54 Nebr. 712, although in that case the rule was carried to its uttermost limit, and was vigorously dissented from by one of the judges and two of the then court commissioners. There being, then, nothing in the record or in the conveyances

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through which the appellee claims, and no information coming to him by inquiry that the apparent union of the estates did not operate as a merger, and that such was not the intention of his grantor, then we think, on principle, that as to him, a union of the two estates was in fact accomplished, and that he obtained title to the property in controversy discharged of the lien sought to be enforced by the plaintiff and appellant. * * * In our consideration of the case, we have not been unmindful of the rule as to a mortgage being regarded as an incident to the debt it secures, and passes with an assignment of the latter, and that the payment to the mortgagee, who has assigned the debt, and who is not authorized to receive it, which has been a fruitful source of litigation, will not satisfy the debt or discharge the lien, even though no assignment of the mortgage is placed of record. But those questions do not enter into the case at bar. The question here is whether one who purchases real property, relying on a record which shows a discharge or destruction of a mortgage lien thereon by one who apparently is possessed with authority to accomplish that result, will be protected against one who, having an interest in such real estate, has failed or neglected to have recorded the evidence of such interest. We conclude, therefore, that the purchaser, under the circumstances as disclosed by the record in the case at bar, should and ought to be protected.

The decree of the district court is, for the reasons given, affirmed.[17]

DECKER v. BOICE.

COURT OF APPEALS OF NEW YORK, 1880.
83 N. Y. 215.

ANDREWS, J. The plaintiff claims title to six undivided ninth parts of the premises, of which partition is sought in this action, as purchaser, on a statute foreclosure of two mortgages, dated April 1, 1872, executed by Charles Boice, one to William Henry Boice, and the other to Catherine Decker, each mortgage being on the undivided six-ninths of the premises. The mortgages were recorded December 27, 1872. The mortgage executed to William Henry Boice was assigned by him to one Crossett, November 6, 1873, and the assignment was recorded January 3, 1874, and was afterward assigned by Crossett to one Kellogg, whose assignment was recorded June 29, 1877. The mortgage to Catherine

[17] See also, Gregory v. Savage, 32 Conn. 250; McCormick v. Bauer, 122 Ill. 573; Artz v. Yeager, 30 Ind. App. 677; Pritchard v. Kalamazoo College, 82 Mich. 587; Brooks v. Peoples Loan Co., 46 W. L. Bul. (Ohio) 214.

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Decker was assigned by her to Peter E. N. Decker, June 24, 1876, and, on the same day, by him to Hiram Crandall, and both assignments were recorded on that day.

The defendants, Mary J. Clark and Sally Ann Rockefeller, each claim to hold a lien on the undivided six-ninths of the premises purchased by the plaintiff, by virtue of mortgages executed to them severally by Charles Boice, of the same date as the mortgages executed by him to William Henry Boice and Catherine Decker. The mortgage to Mary J. Clark was recorded July 24, 1877, and the mortgage to Sally Ann Rockefeller, August 4, 1877. The four mortgages were given on the purchase by the mortgagor, Charles Boice, from the several mortgagees, of their interest as children and heirs-at-law of Henry Boice, deceased, in about ninety acres of land, of which he died seized, each child being entitled to an undivded ninth part thereof.

The controversy in this case turns upon the effect to be given to the recording of the assignments of the mortgages under which the plaintiff purchased. The court at Special Term found that the several assignees were purchasers in good faith, and for a valuable consideration, without notice of the mortgages held by the defendants. If the assignees, by the recording of their assignments, obtained priority over the defendants' mortgages, the plaintiff, as the purchaser on the foreclosure, is entitled to the benefit of their position, and the defendants' mortgages, being upon that assumption subordinate liens, were cut off by the sale.[18]

The four mortgages, as has been stated, were executed at the same time. Each mortgagee had notice of the other mortgages, when his mortgage was taken, and the mortgagees mutually agreed that neither mortgage should have priority over any other, but that all should be equal liens on the mortgaged premises. It is clear that Boice and Decker acquired no priority over the Clark and Rockefeller mortgages by having their mortgages first recorded, for two reasons: First. They had notice of the Clark and Rockefeller mortgages when they put their mortgages on record; and second, all the mortgages having been executed concurrently, Boice and Decker were not, as to the holders of the Clark and Rockefeller mortgages, subsequent purchasers, and the recording acts as between them had no application. (Greene v. Warnick, 64 N. Y. 220.) So also upon the assignment of the Boice and Decker mortgages, the assignees acquired no priority from the fact that the assigned mortgages were recorded when they took the assignments, or because they had no notice when they purchased of the existence of the Clark and Rockefeller mortgages. The general rule that the

[18] See also, Cahalan v. Monroe, Smaltz & Co., 56 Ala. 303; Berryhill v. Kirchner, 96 Pa. 489.

Compare, Duff v. Randall, 116 Cal. 226; Ehle v. Brown, 31 Wis. 405.

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purchaser of a chose in action must abide by the title of the person from whom he buys and takes subject to the equities of the debtor, and also the latent equities of third persons, applies in general to the assignee of a mortgage. Boice and Decker held their mortgages subject to the equity growing out of the agreement between the four mortgagees that all the mortgages should be equal liens and that neither should have priority. Their assignees were affected by this equity, although they purchased without notice, and the fact that the mortgages were recorded does not aid them, for the reason that it has been authoritatively settled that the assignee of a recorded mortgage, although an assignee in good faith and for a valuable consideration, gets no preference over an unrecorded deed or mortgage by reason of such record when the mortgagee and assignor himself could not claim it in consequence of his having had notice, or by reason of any other equity. (Fort v. Burch, 5 Den. 187; Westbrook v. Gleason, 79 N. Y. 23.) The contrary rule which was declared in Jackson v. Van Valkenburgh (8 Cow. 260), under the former statute, cannot, in view of the decisions made under the Revised Statutes, be regarded as any longer in force.

We come then to the question whether the assignee of the Boice and Decker mortgages, by recording their assignments, acquired under the Recording Act priority over the unrecorded mortgages of the defendants. An assignee of a mortgage is by the express terms of the Recording Act a purchaser, and both the mortgage and the assignment, if in writing, are conveyances. (1 Rev. Stat. 756, § 37, 38.) The term "conveyance" is defined by the thirty-eighth section to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned; or by which the title to any real estate may be affected in law or equity, with certain specified exceptions not material to the present inquiry. It is doubtless somewhat incongruous, in view of the doctrine now well settled in this state, that a mortgage is a mere security, and not a title, to define it as a conveyance of an estate or interest in the land mortgaged, but the character of mortgages as mere choses in action was not as well understood when the Revised Statutes were enacted as it has since been. By the common law, a mortgage was a conditional conveyance of the land mortgaged, and it still is a conveyance within the Recording Act. An assignment of a mortgage in writing is also a conveyance within the act, for the reason that it is an instrument by which the mortgagee's interest or title is transferred. This is substantially the construction given to the act by the chancellor in Vanderkamp v. Shelton (11 Paige 28), and it has been recognized in subsequent cases.

The assignments of the Boice and Decker mortgages were recorded before the recording of the mortgages to the defendants. The assignees, therefore, were purchasers whose conveyances were first

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recorded, and having taken the assignments in good faith and for a valuable consideration, the unrecorded mortgages were, as to them, by the express terms of the statute, void. Under the Recording Act an assignee of a mortgage may, as against a prior unrecorded mortgage acquire a better right than was possessed by his assignor. This principle was distinctly asserted in the recent case of Westbrook v. Gleason (79 N. Y. 23). In that case there were two successive mortgages on the same land. The mortgagor, in the first mortgage, was the mortgagee in the second. The second mortgage was first recorded and was then assigned to a bona fide purchaser for value before the first mortgage was recorded, but the assignment was not recorded until after the recording of the first mortgage. The mortgagee in the second mortgage could not have claimed priority, because when he recorded his mortgage he had notice of the prior mortgage which he had himself executed. It was held in a controversy between assignees of the respective mortgages, that the assignee of the second mortgage could derive no benefit from the prior record of his mortgage, as he stood as to that in the shoes of his assignor, and that he was not entitled to priority by the record of his assignment because the first mortgage was recorded before the recording of his assignment. But it was conceded, that if he had recorded his assignment before the first mortgage was recorded, he would have gained a preference.

Rapallo, J., said: "He would have been protected had he taken the precaution to place his assignment on record before the plaintiff's mortgage was recorded." The same principle was decided in Fort v. Burch (*supra*). The remark has been made in some recent cases, following dicta in earlier cases, that the only purpose of the statute, authorizing the recording of assignments of mortgages, was to regulate the relation to each other of successive assignees of the mortgagee of the same mortgage. (Greene v. Warnick, 64 N. Y. 226; Crane v. Turner, 67 *id.* 437; Westbrook v. Gleason, 79 *id.* 32). But in none of them was this remark essential to the decision. In Greene v. Warnick, the controversy was as to priority between two concurrent mortgages, one of which, in violation of the agreement between the two mortgagees, had been first recorded and afterward assigned to Warnick. But the other mortgage was recorded before the assignment to Warnick had been either made or recorded, and, as Warnick's conveyance, i. e., his assignment, was not first recorded, he was not within the protection of the statute, and it was so decided. In Crane v. Turner, the equitable owner of land in possession under a contract of purchase executed a mortgage which the mortgagee assigned, and the mortgage and assignment were both recorded. Afterward the mortgagor received a deed of the premises and conveyed them, taking back a mortgage which he recorded, and then assigned this mortgage to an assignee who had no actual

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notice of the first mortgage, but who had notice that the mortgagor in that mortgage had been in possession of the premises under his contract from before the date of the mortgage. The assignee recorded his assignment, but it was held that the first mortgage had priority.

It is doubtless true that it was one object of the provision for recording assignments of mortgages, to protect a subsequent assignee of the mortgagee of the same mortgage from being defrauded through a prior assignment not before required to be recorded, and of which he might have no notice. (James v. Morey, 2 Cow. 246; Vanderkamp v. Shelton, *supra.*) But this was not the only purpose.[19] The assignee in good faith and for value of a mortgage, by recording his assignment, may gain priority over a prior unrecorded mortgage, although it could not be claimed by his assignor.

We think the judgment is right and that it should be affirmed.

All concur.

Judgment affirmed.[20]

HOAG v. SAYRE.

COURT OF APPEALS OF NEW JERSEY, 1881.
33 N. J. Eq. 552.

[On Dec. 3, 1877, defendant Hoag obtained a chattel mortgage on the goods in question, to secure $2,150. This mortgage was not recorded in the proper county. On Feb. 14, 1878, defendant Fisher

[19] Gibson v. Thomas, 180 N. Y. 483; Syracuse Bank v. Merrick, supra. See also, 6 Col. L. Rev. 547.

[20] See also, Burns v. Berry, 42 Mich. 176; Butler v. Bank of Mazeppa, 94 Wis. 351; Jackson v. Reid, 30 Kans. 10.

In Hull v. Diehl, 21 Mont. 71, under a statute identical with that of New York, supra, a bona fide assignee of a second mortgage was given priority over an unrecorded first mortgage, although he had not recorded his assignment, the court holding that he was a "purchaser" under the statute but that he was excused from the requirement of first duly recording his conveyance because his assignment was not a "conveyance." The court said, "Is an assignment of a mortgage an instrument by which real estate, or an interest therein, is 'created, alienated, mortgaged or assigned'? The mortgage itself does not create, alienate or assign any real estate or interest in real estate, nor does the assignment of the mortgage have such effect."

In Congregational Church Bldg. Society v. Scandinavian Church, 24 Wash. 433, an assignee of a second mortgage was preferred to a defectively recorded first mortgage, on the doctrine that an assignee of a chose in action takes it free from latent equities of third persons of which he has no notice.

Compare with the principal case, Coonrod v. Kelly, 119 Fed. 841; Paul v. Paul, 5 N. Y. S. 743; Landigan v. Mayer, 32 Ore. 245.

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obtained a mortgage upon the same property to secure $1,160. This mortgage was recorded in the proper county on Mar. 2, 1878, but Fisher at the time he took the mortgage had knowledge of the prior mortgage to Hoag. Complainant Sayre is the assignee of a judgment for $6,000, recovered against the mortgagor on Mar. 2, 1878, under which an execution was issued and levied on the property in question.

In the Court of Chancery (Sayre v. Hewes, 32 N. J. Eq. 652) the Vice-Chancellor said, *inter alia,* "He (Fisher) took his mortgage with notice that a prior mortgage had been given to Mr. Hoag, and he must, therefore, as between Hoag and himself, take the subordinate position. But he and complainant, as between themselves, occupy equal rank; the judgment of the one, and the mortgage of the other, were recovered and filed on the same day. So that the relative positions of the several parties are as follows: The complainant and Fisher, as between themselves, hold concurrent liens, but Hoag stands prior to Fisher as betwen Fisher and himself, and the complainant, as betwen Hoag and himself, stands prior to Hoag. In this condition of affairs, it is impossible to give the complainant the full benefit of the superiority of his position over Hoag, without advancing him to the front against everybody. The fact that the complainant's position is superior to that of Hoag, and that Fisher's is subordinate to that held by Hoag, raises the complainant above Fisher as well as Hoag. Where a third encumbrancer acquires a right of priority as against the first, but the act or omission from which such right flows does not change his relative position toward the second, yet, as it is impossible to put him in advance of the first, without also advancing him over the second, his lien must, of necessity, be advanced to the first position as against both the first and second incumbrancers. Clement v. Kaighn, 2 McCart. 47.

"The decree will declare the liens of the parties to stand in the following order: The complainant shall be first paid the amount due on the judgment assigned to him by Albert H. Hewes; the defendant Hoag shall next be paid the amount due on his mortgage, and, lastly, Fisher shall be paid the amount due on his mortgage."

The defendant Hoag appealed.]

BEASLEY, C. J. I agree with the vice-chancellor in his settlement of the disputed facts in this case, but it seems to me that an error has crept into the decree with respect to the marshaling of the encumbrances. These liens are of this character: the mortgage first in date is held by the appellant, Hoag; then comes a mortgage held by Frederick Fisher, one of the defendants, and lastly is the judgment of the defendant Sayre. This first mortgage was not recorded in the proper county, and therefore is subordinate to the judgment, but it is paramount to the second mortgage, which was taken with knowledge of the existence of this first lien. In this

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state of things, the decree places the judgment and the first mortgage, by way of prference, before the second mortgage. This, as it seems to me, is unjust and inadmissible.

Upon what possible principle is the result in this case to be justified? Fisher, when he took his mortgage, knew that there was an antecedent mortgage on the same property, securing the sum of $2,150, with interest. He had his own mortgage duly recorded, so that it became incontestably the second legal lien; in this position of affairs this judgment is entered, and he at once finds himself, without any fault on his part, degraded from the position of a second encumbrancer to that of a third encumbrancer, and instead of the mortgaged property being subject to a claim prior to his own of but $2,150, it is subject to paramount claims which amount to the sum of $5,150. If such a principle be correct, it does not appear that any person, under any circumstances, can take a second or other subordinate mortgage upon property, without putting his interests in the utmost jeopardy. Under the prevalence of such a rule of law, a subsequent encumbrancer would be obliged to see that the status of the primary encumbrance was, in all respects, unexceptionable, under penalty, if a flaw should be undetected, of having his lien superseded by every judgment that might be entered at a later date. Such a rule would be as inexpedient as it would be unjust.

I cannot but think that any one who will look carefully into the subject will perceive that no rule applicable to such a juncture as this can be admissible that is not founded on the theory of leaving the second mortgagee in the position originally acquired by him, without respect to the neglects or shortcomings of the holder of the previous mortgage or the subsequent judgments of creditors. Viewed in this aspect, this would be the result: the judgment creditor would, in the marshaling of these liens, take priority over the first mortgage; as between the judgment and that mortgage, the former must be first paid. But with respect to the second mortgage, the judgment creditor, as such, has no claim to stand first, his only claim in that regard being his right to stand in the shoes of the first mortgagee, and assert all the privileges incident to that position. But he can exact nothing further than such privileges; he can legally say that he has the paramount lien on the property to the extent of the sum secured by the first mortgage; but he cannot legally say that, with respect to the second mortgagee, he has any paramount lien beyond this. No additional burthen can be put upon the land to the detriment of the second mortgagee. If the judgment be for a sum greater than that secured by the first mortgage, then, by right of representation, such judgment will constitute the first lien to the full extent, and no further, of the first mortgage; if it be for a less sum than the first mortgage, it will take precedence and consume the first mortgage to that extent only. It will be observed that by these ad-

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justments the priority of the first mortgage, with regard to the second mortgage will be exhausted, either partially or wholly, so that, to the extent of such exhaustion, it will be postponed to the second mortgage.

The doctrine thus propounded is but the development of the principle maintained and acted on in Clement v. Kaighn, 2 McCart. 48. In that case there was a judgment without an execution; then a mortgage, and then judgments on which execution had been taken out. These latter judgments were entitled to precedence over the first, but were subordinate to the mortgage. Chancellor Green decided that the first judgment on the mortgaged premises, by reason of the failure to sue out execution upon it, should be postponed to the encumbrance of the junior judgments, and, as an inevitable consequence, that it should be postponed to the mortgage which was prior to the junior judgments, and whose priority was not to be affected by any laches of the holder of such prior judgment.

In my opinion, the decree in this case should be modified so as to direct the payment of these encumbrances in this order, viz.: first, the judgment of Sayre to the amount secured by the first mortgage; second, the payment of the residue of such judgment and the second mortgage, *pari passu*, as they were concurrent liens, being entered on the same day; third, the payment of the first mortgage.

DIXON, J. dissenting.

I agree with the conclusions which the vice-chancellor has reached upon the facts.

But I dissent from the legal rule by which he fixes the order of priority, for I do not think it necessary to advance the complainant Sayre to the front against everybody, in order to give him the full benefit of his superiority to Hoag.

Nor do I assent to the rule laid down in the opinion just read, since I see no reason for regarding the complainant as substituted in the stead and rights of Hoag as against Fisher, merely because Hoag failed to comply with the registry laws. The effect of non-compliance with those laws is declared by themselves to be, not that the rights of him in default shall be transferred to the subsequent encumbrancers, but that his claim shall be void as to them.

Therefore, if there be three encumbrancers, A, B and C, in the order of time, and A's lien be prior to B's, and B's to C's, but, for A's omission to properly register his lien, it is void as to C's, then the fund should be disposed of as follows:

1. Deduct from the *whole fund* the amount of B's lien, and apply the balance to pay C. This gives C just what he would have if A had no existence.

2. Deduct from the *whole fund* the amount of A's lien, and apply the balance to pay B. This gives B what he is entitled to.

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3. The balance remaining after these payments are made to B and C is to be applied to A's lien.

To illustrate: Suppose the fund to be $5,000; A's lien to be $3,000; B's lien to be $4,000, and C's lien to be $2,000. Then, C receives $5,000, less $4,000=$1,000; B receives $5,000, less $3,000=$2,000; A receives $5,000, less ($1,000+$2,000)=$2,000.

Or suppose the fund to be $5,000, and each of these encumbrances to be $5,000; then it will appear that A, the first in time, will take it all; since, except for the registry laws, he would clearly be entitled to it, and the registry laws simply prevent his taking anything by which C's security may be lessened. But C's security was nothing at the beginning, for B's prior lien covered the whole fund; and C, therefore, has no right by which A's claim can be impaired.

Where B's and C's claims are concurrent in time and lien, but A is prior to B, and void as to C (as in the present case), the distribution should be as follows

1. Divide the *whole fund* in the proportion of B's and C's claims, and give to C his proportion. Thus is A ignored in fixing C's rights.
2. Deduct from the *whole fund* the amount of A's lien, and apply the balance to B's claim.
3. The balance remaining after both payments goes to A.

By applying these rules to the case before us, it will be seen that, in my judgment, Fisher alone is injured by the decree below; but as he is not a party to this appeal, the decree cannot be changed here for his sake, and therefore, I think, should be affirmed.

For affirmance—Dixon—1.

For reversal—Beasley, C. J., Depue, Knapp, Magie, Parker, Reed, Scudder, Van Syckel, Clement, Cole, Dodd Green—12.

LEARNED, P. J., in BACON v. VAN SCHOONHOVEN, 19 Hun. 158. (N. Y. Sup. Ct. 1879).

In the view above taken, the Owens mortgage is prior to the Carpenter mortgage; the Carpenter mortgage is prior to the Van Schoonhoven mortgage; and the Van Schoonhoven mortgage is prior to the Owens mortgage.

The equitable rule, in such a case, is this. From the avails of the sale there must be set apart the amount of the Owens mortgage. That amount, or so much thereof as may be necessary therefor, is to be applied on the Van Schoonhoven mortgage, and the balance thereof, if any, on the Owens mortgage. The residue of the avails, after thus setting apart the amount of the Owens mortgage, is to be applied, first on the Carpenter mortgage, and next on the balance remaining on the Van Schoonhoven mortgage; and, lastly, the surplus is to be applied on the Owens mortgage.

In the present case this rule is equivalent to paying the Carpenter and the Van Schoonhoven mortgages before that of Owens. If, however, the Owens mortgage had been larger than the Van Schoon-

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hoven mortgage, the importance of those special provisions would have appeared.[21]

SCOTT, J., in DAY v. MUNSON, 14 Ohio St. 488. (1863.)

The case, then, stands thus: The plaintiffs' mortgages, not having been re-filed, pursuant to statute, are void as to Younglove & Hoyt, the third mortgagees; but the plaintiffs retain their priority of lien over Warren, who holds under Wilcox, the second mortgagee, and whose mortgage was taken with actual notice of the plaintiffs' prior mortgages. Warren's lien under the Wilcox mortgage, has priority over that of the third mortgagees, and is not to be affected by the laches of the plaintiffs. The plaintiffs' mortgages, are then, not to affect the rights of the third mortgagees; nor is the laches of the plaintiffs to affect the rights of the second mortgagee; and whatever rights these conditions leave to the plaintiffs, they still retain. The result will be, if the fund is insufficient for the discharge of all mortgages, that the third mortgagees, Younglove & Hoyt, are entitled to so much of the fund as would be applicable on their mortgage, after satisfying Warren's prior lien. Warren is entitled to so much of the fund as would be applicable to the satisfaction of his claim, leaving the third mortgage out of the question, and preserving the plaintiff's priority of lien. And the plaintiffs are entitled to the residue.

COOPER, J., in GOODBAR & CO. v. DUNN, 61 Miss. 618. (1884).

Dunn has a mortgage on these ten acres void for uncertainty as against Goodbar & Co., but good as against Lemmon & Gale, who had notice of the mistake, while Lemmon & Gale have a mortgage which sufficiently describes the land and which has priority over the attachment of Goodbar & Co.

What are the rights of the parties under these circumstances? On a casual examination it would seem that Dunn could take the proceeds of the land from Lemmon & Gale, and that Goodbar & Co. could take it from him, and that Lemmon & Gale could re-take it to lose it again to Dunn, and so the one in possession of the fund would always find his rights postponed to one of the other claimants.

We think, however, the rights of the respective parties are preserved under such circumstances by the following rule:

If the proceeds of the property are insufficient to discharge all the liens but exceed the amount of the second mortgage, an amount equal to the second mortgage is to be set aside and the balance so far as necessary appropriated to the payment of the third encumbrancer. The priority of the first mortgage over the second is to be retained on a settlement of their rights for an amount equal to the first mortgage debt after subtracting therefrom the sum paid to the third

[21] Same case on appeal, supra.

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encumbrancer; if, however, the sum realized by a sale of the property does not equal the second mortgage debt, the third encumbrancer is to be ignored, and the fund distributed between the first and second mortgagees, the first being paid his debt in full. In this way the rights of all the parties are preserved, for the third encumbrancer is entitled to nothing until the second is paid, and the second has no right to any of the fund until an amount equal to the first mortgage has been taken therefrom, and the first mortgagee should not be permitted to charge against the second any sum which by reason of his laches has been appropriated to the third.[22]

[22] Compare Porter v. Ourada, supra.

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CHAPTER XI.

CONVEYANCE OF THE EQUITY OF REDEMPTION.

KELLER v. ASHFORD.

SUPREME COURT OF THE UNITED STATES, 1889.
133 U. S. 610.

This was a bill in equity by Henrietta C. Keller, the holder of a promissory note for $2,000, made by one Thompson, secured by his mortgage of land in Washington, against Francis A. Ashford as grantee of the land subject to this mortgage, and who by the terms of the deed to him assumed payment of incumbrances on the land. The bill prayed for a decree in the plaintiff's favor against Ashford for the amount of that note, and for general relief. The case was heard upon pleadings and proofs, by which it appeared to be as follows:

On August 17, 1875, Thompson, being seised in fee of lot 5 in square 889 in the city of Washington, conveyed it to one Rohrer, by a deed of trust in the nature of a mortgage, to secure the payment of Thompson's promissory note of that date for $1,500 payable in three years with interest at ten per cent, held by one Harkness.

On February 21, 1876, Thompson conveyed the same lot by like deed of trust to one Gordon, to secure the payment of Thompson's note of that date for $2,000, payable in one year, with interest at eight per cent. yearly until paid, to the order of Moses Kelly; and Kelly endorsed this note for full value to the plaintiff.

On January 1, 1877, Thompson, at the instance and persuasion of Kelly, executed and acknowledged and delivered to Kelly a deed; expressed to be made in consideration of the sum of $4,500; conveying this lot, together with lots 6, 7 and 8 in the same square (each of which three lots was also in fact subject to a mortgage for $2,000) to Ashford in fee, "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by paid party of the second part;" and containing covenants by the grantor of warranty against all persons claiming from, under or through him, and for further assurance. At the date of this deed, the only incumbrances on the land conveyed were the five mortgages above mentioned, and some unpaid taxes assessed against Thompson while owner of the land. On January 22, 1877, this

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deed, together with a notary's certificate of its acknowledgment by the grantor, was recorded in the registry of the District of Columbia.

No consideration was actually paid for the conveyance. The value of the lots conveyed was, according to Thompson's testimony, $4,000 each or $16,000 in all, or, according to Ashford's testimony, not less than $3,400 each or $13,600 in all.

Thompson testified that he never had any negotiations with Ashford about the property; and that he was induced to make this deed by the assurance of Kelly that the grantee would assume the incumbrances upon the land and relieve him from liability upon the notes he had given secured by mortgage.

Ashford testified that he never had any negotiations with any one about the purchase of the land; and that in February, 1877, Kelly, who was his father-in-law, to whom he had lent much money and for whom he had endorsed several notes, told him that, in order to secure him from loss, he had procured a conveyance to be made to him of these four lots, in which he thought "there was considerable equity;" informed him at the same time that there were incumbrances or mortgages upon the property, but did not specifically mention any of them, except the $1,500 mortgage upon lot 5; told him that the interest on this was pressing, and that, if he would pay it, Kelly would relieve him from any further trouble as to the incumbrances; and advised him to go on and collect the rents of the property, so as to indemnify himself against that interest and pay the taxes in arrears.

It was proved that Ashford in March, 1877, entered into possession of the four lots, and paid the taxes previously assessed upon them, and also paid interest accruing under the mortgage for $1,500 on lot 5, and collected the rents of the four lots, until December 4, 1877, when he sold and conveyed lots 7 and 8 to one Duncan, subject to existing incumbrances thereon; and continued to collect the rents of the other two lots, and to pay the interest accruing under the mortgage for $1,500 on lot 5, until March 14, 1878, when this lot was sold, pursuant to the provisions of that mortgage, by public auction, and conveyed to Harkness for the sum of $1,700, which was insufficient to satisfy the amount then due on that mortgage.

On comparing Ashford's testimony with that of Boarman, the plaintiff's attorney, and with a letter written by Ashford to Boarman on October 3, 1877, it clearly appears that Ashford was informed of the clause in the deed to him, assuming payment of incumbrances, and was requested to pay the plaintiff's mortgage, as early as September, 1877, and then, as well as constantly afterwards, declined to pay it, or to recognize any personal liability to do so. There was no direct evidence that he knew of this clause before September, 1877.

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The plaintiff brought an action at law upon the note against Thompson as maker and Kelly as endorser on November 13, 1877, and recovered judgment against both in December, 1877, on which execution issued and was returned unsatisfied, April 15, 1878.

The present bill was filed May 13, 1878. A decree dismissing the bill was rendered in Special Term, May 9, 1882, which, after the death of Ashford and the substitution of his executrix in his stead, was affirmed in general term, February 16, 1885, upon the grounds that Ashford had never accepted the deed to him, and also that the plaintiff's remedy, if any, was at law. 3 Mackey, 455.

GRAY, J.

* * * * * * *

The questions to be decided concern the extent, the obligation and the enforcement of the agreement created by the clause in the deed of the conveyance from Thompson to Ashford of this and three other lots, "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part."

The five mortgages made by the grantor, namely, the plaintiff's mortgage for $2,000 and a prior mortgage for $1,500 on lot 5, and a mortgage of $2,000 on each of the three other lots, and some unpaid taxes which had been assessed against the grantor, were incumbrances, and were the only incumbrances existing upon the granted premises at the time of the execution of this conveyance. Rawle on Covenants (5th ed.) sec. 77. The clause in question, by the words "certain incumbrances now resting thereon," designates and comprehends all those mortgages and taxes, as clearly as if the words used had been "the incumbrances," or "all incumbrances," or had particularly described each mortgage and each tax. We give no weight to Thompson's testimony as to Kelly's previous conversation with him to the same effect, because that conversation is not shown to have been authorized by or communicated to Ashford, and cannot affect the legal construction of the deed as against him.

It was argued that, because the deed contains a covenant of special warranty against all persons claiming under the grantor, the words "certain incumbrances" cannot include the mortgages made by the grantor, but must be limited to the unpaid taxes which, it is said, would not come within the covenant of special warranty. But the answer to this argument is that any person claiming title by virtue of a lien created by taxes assessed against the grantor would claim under the grantor, equally with one claiming by a mortgage from him; and incumbrances expressly assumed by the grantee are necessarily excluded from the covenants of the grantor.[1]

[1] "The clause in a deed referring to the existence of a prior mortgage is of much importance in other ways than in determining whether the purchaser engages to pay the mortgage, or merely buys subject to it.

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Ashford is not shown to have had any knowledge of the conveyance at the time of its execution; and a suggestion was made in argument, based upon some vague expressions in his testimony, that the conveyance was intended to be made to him, by way of mortgage only, to secure him against loss on his previous loans to and endorsements for Kelly. But his subsequent acts are quite inconsistent with the theory that the conveyance did not vest the legal estate in him absolutely.

Within a month or two after the conveyance, having been told that the four lots had been conveyed to him and were subject to incumbrances, (although perhaps not then informed of the amount of the incumbrances,) he entered into possession of the lots, and thenceforth collected the rents; and within nine months after the conveyance he had notice of the clause assuming payment of incumbrances, and was requested to pay the plaintiff's mortgage, and declined to pay it or to recognize any personal liability for it; yet he afterwards sold and conveyed away two of the lots, and continued to keep possession and to collect rents of the other two. Having thus accepted the benefit of the conveyance, he cannot repudiate the burden imposed upon him by the express agreement therein, and would clearly have been liable to his grantor for any breach of that agreement. Blyer v. Monholland, 2 Sandf. Ch. 478; Coolidge v. Smith, 129 Mass. 554; Locke v. Homer, 131 Mass. 93; Muhlig v. Fiske, 131 Mass. 110.

The case therefore stands just as if Ashford had himself received a deed by which he in terms agreed to pay a mortgage made by the grantor. In such a case, according to the general, not to say uniform, current of American authority, as shown by the cases collected in the briefs of counsel, the mortgagee is entitled in some form to enforce the agreement against the grantee; and much of the argument at the bar was devoted to the question whether his remedy should be at law or in equity.

Upon the question whether the mortgagee could sue at law there

In the first place it may qualify the grantor's liability upon the covenants of the deed against incumbrances by showing the existence of the mortgage, and that, as between him and the grantee, the latter is to pay it. It may prevent, by a statement as to what an incumbrance upon the property is, any liability on the part of the grantor to the penalties imposed by statute upon one who sells incumbered property without disclosing the incumbrance. It may preclude the grantee from impeaching the validity of the mortgage existing upon the property conveyed.

* * * * * * * *

"When land is conveyed 'subject to' a mortgage, and the amount of it is deducted from the consideration, with the intention that it shall be paid by the grantee, it is important that the mortgage be excepted from the covenants of the deed; otherwise the grantor may be held to have covenanted against the incumbrance, and to have made himself liable for its payment." Jones, Mortgages, § 735. See also, Brewster, Conveyancing, § 204.

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is no occasion to examine the conflicting decisions in the courts of the several States, because it is clearly settled in this court that he could not.

This case cannot be distinguished from that of National Bank v. Grand Lodge, 98 U. S. 123, and clearly falls within the general rule upon which the judgment in that case was founded.

It was there held that a contract by which the Grand Lodge, for a consideration moving from another corporation, agreed with it to assume the payment of its bonds, would not support an action against the Grand Lodge by a holder of such bonds; and Mr. Justice Strong, delivering judgment, after observing that the contract was made between and for the benefit of the two corporations, that the holders of the bonds were not parties to it, and that there was no privity between them and the Grand Lodge, said: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and a defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt, the general rule is, that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promissor's hands or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raised from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it, (there being no novation,) he has a right of action against the promissor for his own indemnity; and if the original creditor can also sue, the promissor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required." 98 U. S. 124. See also Cragin v. Lovell, 109 U. S. 194.

In the earlier case of Hendrick v. Lindsay, 93 U. S. 143, cited by the defendant, a request, accompanied by a promise of indemnity, to one person, to sign an appeal bond, was construed to include another person who signed it as surety, and therefore to support a joint action by the principal and the surety, both of whom had signed the bond relying upon the promise, so that the only consideration for the promise moved from them.

In the case at bar, the promise of Ashford was to Thompson and

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not to the mortgagees, and there was no privity of contract between them and Ashford. The consideration of the promise moved from Thompson alone. The only object of the promise was to benefit him, and not to benefit the mortgagees or other incumbrancers; and they did not know of or assent to the promise at the time it was made, nor afterwards do or omit any act on the faith of it. It is clear, therefore, that Thompson only could maintain an action at law upon that promise.

In equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee. Parsons v. Freeman, 2 P. Wms. 664; note; S. C. Ambler, 115; Oxford v. Rodney, 14 Ves. 417, 424; *In re* Empress Engineering Co., 16 Ch. D. 125; Gandy v. Gandy, 30 Ch. D. 57, 67.

But it has been held by many state courts of high authority, in accordance with the suggestion of Lord Hardwicke in Parsons v. Freeman, Ambler, 116, that in a court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser.

This result has been attained by a development and application of the ancient and familiar doctrine in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt. Maure v. Harrison, 1 Eq. Cas. Ab. 93, pl. 5; Bac. Ab. Surety, D. 4; Wright v. Morley, 11 Ves. 12, 22; Phillips v. Thompson, 2 Johns. Ch. 418; Curtis v. Tyler, 9 Paige 432, 435; New Bedford Institution for Savings v. Fairhaven Bank, 9 Allen 175; Hampton v. Phipps, 108 U. S. 260, 263.

In Hampton v. Phipps, just cited, this court declared the doctrine to be well settled, and applicable "equally between sureties, so that securities placed by the principal in the hands of one, to operate as an indemnity by payment of the debt, shall enure to the benefit of all;" and declined to apply the doctrine to the case before it, because the mortgage in question was given by one surety to another merely to indemnify him against being compelled to pay a greater share of the debt than the sureties had agreed between themselves that he should bear, and he had not been compelled to pay a greater share.

The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor; but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on

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the right of the creditor to avail himself of the right of the surety against the principal. If the person, who is admitted to be the creditor's debtor stands at the time of receiving the security, in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt.

It is in accordance with the doctrine, thus understood, that the Court of Chancery of New York, the Court of Chancery and the Court of Errors of New Jersey, and the Supreme Court of Michigan have held a mortgagee to be entitled to avail himself of an agreement in a deed of conveyance from the mortgagor by which the grantee promises to pay the mortgage. Halsey v. Reed, 9 Paige. 446, 452; King v. Whitely, 10 Paige, 465; Blyer v. Monholland, 2 Sandf. Ch. 478; Klapworth v. Dressler, 2 Beasley 62; Hoy v. Bramhall, 4 C. E. Green 74, 563; Crowell v. Currier, 12 C. E. Green 152; S. C. on appeal, nom. Crowell v. St. Barhabas Hospital, 12 C. E. Green 650; Arnaud v. Grigg, 2 Stew. Eq. 482; Youngs v. Trustees of Public Schools, 4 Stew. Eq. 290; Crawford v. Edwards, 33 Michigan. 354, 360; Miller v. Thompson, 34 Michigan 10; Higman v. Stewart, 38 Michigan, 513, 523; Hicks v. McGarry, 38 Michigan 667; Booth v. Connecticut Ins. Co., 43 Michigan 299. See also Pardee v. Treat, 82 N. Y. 385, 387; Coffin v. Adams, 131 Mass. 133, 137; Biddel v. Brizzolara, 64 California 354; George v. Andrews, 60 Maryland 26; Osborne v. Cabell, 77 Virginia 462.

"Recovery of the deficiency after sale of the mortgaged premises, against a subsequent purchaser, is adjudged in a court of equity to a mortgagee not in virtue of any original equity residing in him. He is allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action, and save the mortgagor, as the intermediate party, from being harassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The equity on which his relief depends is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor." 12 C. E. Green 655, 656.

The decisions of this court, cited for the defendant, are not only quite consistent with this conclusion, but strongly tend to define the true position of a mortgagee, who has in no way acted on the faith

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of, or otherwise made himself a party to, the agreement of the mortgagor's grantee to pay the mortgage; holding on the one hand, that such a mortgagee has no greater right than the mortgagor has against the grantee, and therefore cannot object to the striking out by a court of equity, or to the release by the mortgagor, of such an agreement when inserted in the deed by mistake; Elliott v. Sackett, 108 U. S. 132; Drury v. Hayden, 111 U. S. 223; and, on the other hand, that such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. Shepherd v. May, 115 U. S. 505, 511.

The present case is a strong one for the application of the general doctrine. The land has been sold under a prior mortgage for a sum insufficient to pay that mortgage, leaving nothing to be applied towards the payment of the mortgage held by the plaintiff; and the plaintiff has exhausted her remedy against the mortgagor personally, by recovering judgment against him, execution upon which has been returned unsatisfied.

Although the mortgagor might properly have been made a party to this bill, yet as no objection was taken on that ground at the hearing, and the omission to make him a party cannot prejudice any interest of his, or any right of either party to this suit, it affords no ground for refusing relief. Mechanics' Bank v. Seton, 1 Pet. 299; Whiting v. Bank of United States, 13 Pet. 6; Miller v. Thompson, 34 Michigan 10.

Decree reversed, and case remanded with directions to enter a decree for the plaintiff.[2]

[2] "It is a curious circumstance that though a promise by a third person to pay a mortgage debt can not be distinguished in principle from a promise to pay any other debt, the question has been to some extent separately dealt with. Perhaps, because the subject of mortgages fell within the scope of equity jurisdiction, the attempt was early made by mortgagees to sue in equity those who had assumed an obligation to pay the mortgage, while no such attempt was made with other debts." Williston's Wald's Pollock on Contracts, 260.

In Kollen v. Sooy, 172 Mich. 214, it was held that, by reason of statutory limitations upon the powers of the court of chancery, the mortgagee's only remedy against the assuming grantee is the remedy expressly given by statute of joining the grantee in a bill to foreclose the mortgage and obtaining a decree against him for any deficiency which may arise, and that he can not maintain an independent bill against such grantee. See also Ward v. De Oca, 120 Cal. 102, and Cal. Code Civ. Proc. § 720.

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BURR v. BEERS.

COURT OF APPEALS OF NEW YORK, 1861.
24 N. Y. 178.

Appeal from a judgment of the Supreme Court. The action was brought to recover the amount of two mortgages executed, with his bonds, by E. F. Bullard to John Cramer, committee of the estate of Charles Burr (the plaintiff's intestate), for $1,000 and $2,000 respectively. After giving the mortgages, which covered several parcels of land, Bullard conveyed both parcels to the defendant by a deed containing a recital and covenant in the following words: "Subject to two mortgages held by John Cramer, committee of the estate of Charles Burr, bearing date, &c. (describing the mortgages), which mortgages are deemed and taken as a part of the consideration of this conveyance, and which the party of the second part hereby assumes to pay." Charles Burr was restored to the possession and control of his estate, by an order of the Supreme Court; and he prosecuted this suit to judgment, but died pending this appeal, when the action was continued in the name of the plaintiff as his administratrix. The plaintiff on the trial proved the actual delivery of the deed by Bullard, to the defendant. The defendant objected that there was no privity of contract between him and the plaintiff; but the justice (before whom the case was tried without a jury) held otherwise. Judgment was given for the plaintiff for the amount of the mortgages, which was affirmed at a general term when the defendant appealed to this court.

DENIO, J. If the plaintiff had sought to foreclose the mortgages in question, and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendant parties, the authorities would be abundant to sustain the action in both aspects. (Curtis v. Tyler, 9 Paige 432; Halsey v. Reed, *id.* 446; March v. Pike, 10 *id.* 595; Blyer v. Monholland, 2 Sandf. Ch. R. 478; King v. Whitely, 10 Paige 465; Trotter v. Hughes, 2 Kern 74; Vail v. Foster, 4 Comst. 312; Belmont v. Coman, 22 N. Y. 438.) But I do not understand that the right to a personal judgment for the deficiency is based upon the notion of a direct contract between the grantee of the equity of redemption, and the holder of the mortgage. The cases proceed upon the principle, that the undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. Then the statute relating to foreclosures provides that if the mortgage debt be secured by the obligation or other evidence of debt executed by any other person besides the mortgagor,

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such person may be made a defendant, and may be decreed to pay the deficiency. (2 R. S., p. 191, sec. 154.) Chancellor Walworth, puts the right to a personal judgment in such a case, upon the equity of this statute (9 Paige 432); and Vice-Chancellor Sandford expressly says, that the obligation is not enforced as being made by the grantee of the equity of redemption under such a deed to the mortgagee, but as a promise by the former to the mortgagor to pay him the amount of the mortgage, by paying it to the mortgagee in payment of his debt, which promise the mortgagee is equitably entitled to lay hold of and enforce under the equity of the statute referred to. (2 Sandf. Ch. R., 480.) It is obvious, that the judgment of the Supreme Court in the present case, cannot be sustained upon the doctrine referred to. The plaintiff does not ask to foreclose the mortgage and does not make the principal debtor Bullard, a party. If the judgment can be supported at all, it must be upon the broad principle that if one person make a promise to another, for the benefit of a third person, that third person may maintain an action on the promise. Upon that question there has been a good deal of conflict of judicial opinion. As long ago as 1817, Chancellor Kent, laid it down as a point decided, and referred to not less than eight English and American cases, as sustaining the principle. (Cumberland v. Codrington, 3 J. C. R., 255;) and since then it has been frequently affirmed by judges, after an attentive examination of cases, as in Barker v. Bucklin (2 Denio, 45.) and in the cases therein referred to. These cases, and also those referred to by Chancellor Kent, are doubtless subject to some of the criticisms which have since been applied to them. Some of the opinions were pure *obiter dicta,* and in others, the cases though presenting the point were decided upon other grounds. It cannot however be denied, that the doctrine had been so often asserted, that it had become the prevailing opinion of the profession, that an action would lie in such a case in the name of the creditor, for whose benefit the promise was made. Finally the question came squarely before this court in Lawrence v. Fox (20 N. Y., 268), and we held, with hesitation on the part of a portion of the judges who concurred, while others dissented, that the action would lie. We must therefore regard the point as definitely settled, so far as the courts of this State are concerned.

The judgment appealed from being in accordance with the law as adjudged in that case, must be affirmed.

LOTT, J., also delivered an opinion for affirmance, and all the judges concurred.

Judgment affirmed.[3]

[3] For a collection of authorities, see Williston's Wald's Pollock on Contracts, 260 ff.

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NORWOOD v. DE HART.

COURT OF CHANCERY OF NEW JERSEY, 1879.
30 N. J. Eq. 413.

On bill and general demurrer by De Hart.

The Chancellor [RUNYAN]. This suit is brought to obtain a decree against the defendants for the amount remaining unpaid upon a decree in favor of the complainants in a suit for foreclosure of a mortgage upon premises which were owned by the defendants respectively at different times, subject to the mortgage. The mortgaged premises were sold under the execution issued on the decree in that suit, and were purchased by the holder of a mortgage prior to that of the complainants', for a sum less than the amount due on his mortgage, so that nothing was realized by the complainants on their mortgage.

The bill states that the complainants' mortgage, which is for $2,000 and interest, was given by Charles Meyenberg, on or about the 30th of July, 1869; that the prior mortgage, which was for $2,000 and interest, was given in 1868, by Frank Hunkley; that in May, 1871, one Nicholas Pflaum, then being the owner of the mortgaged premises, and both of the mortgages being subsisting liens thereon for the full amount of the principal thereof, conveyed the property to De Hart, for the consideration of $10,000, as stated in the deed; that the deed contained the declaration and acknowledgment that the conveyance was made subject to the mortgages, and that the principal thereof was computed as part of the purchase-money, and contained, also, the stipulation that the existence of the mortgages should not be held to work a breach of any of the covenants in the deed; that in August, 1871, De Hart conveyed the premises to Benjamin Sire expressly subject to those mortgages and a subsequent one for $1,000 and interest, which had been given thereon by De Hart; that the deed to Sire contained the declaration that the principal of those mortgages was computed as so much of the purchase-money of the property; that in September, 1871, Sire conveyed the property to Moses H. Williams, expressly subject to the three mortgages, and Williams therein assumed the payment of them; that Williams afterwards died, and the executors of his will, in March, 1873, conveyed their right, title and interest in and to the property, to De Hart, subject to the three mortgages, the payment of which he thereby assumed; that subsequently, in December, 1873, De Hart sold and conveyed all his interest in the premises to the defendant Genung, subject, as stated in the deed, to the encumbrance of two mortgages, the principal of which amounted to $4,000, the payment of which Genung thereby expressly assumed; and that, in January,

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1872, the complainant's testator began the above-mentioned suit for foreclosure, which resulted as before stated.

The complainants' claim to a decree against the defendants, rests on the ground that the creditor is entitled to the benefit of all the collateral securities which the debtor has obtained to re-enforce the primary obligation. Klapworth v. Dressler, 2 Beas. 62. But a mortgagee cannot avail himself of an assumption to pay his mortgage contained in a deed to a subsequent purchaser, unless the grantor was himself personally liable to pay the debt. Crowell v. Hospital of St. Barnabas, 12 C. E. Gr. 650, 656; King v. Whitely, 10 Paige 465; Trotter v. Hughes, 12 N. Y. 74. In this case, it does not appear, from the bill, that De Hart's grantor, Pflaum, was personally liable for the payment of the complainants' mortgage. It, therefore, does not appear (giving to the acknowledgment contained in the conveyance from Pflaum to De Hart, that the mortgage debt was allowed as part of the consideration of the conveyance all the effect which, under the decision of this court in Tichenor v. Dodd,[4] 3 Gr. Ch. 454, it would have as between grantor and grantee) that there has ever existed any obligation, on the part of De Hart, to indemnify Pflaum against the complainants' mortgage debt. And this consideration is equally fatal to the claim made un-

[4] In this case the conveyance recited that "The above lots are conveyed subject to the payment of a certain mortgage * * * which said mortgage, or the amount thereof, is computed as so much of the consideration to be paid to the said grantor," and the grantee seems to have paid the consideration named in the deed, less the amount of the mortgage. The grantor, having been required to pay the deficiency due on the mortgage after a sale, sued his grantee for reimbursement. It was held that he should recover, the court saying, "The purchaser agrees to pay a sum of money for the land; but a part of that sum is to be applied to the discharge of the mortgage. Had he paid the whole sum to the mortgagor, he would have had the means with which to pay the mortgage. If he withhold the money, he has no ground of complaint if the mortgagor asks him to pay the amount remaining due."

"Even though there is no clause in the conveyance imposing a personal liability upon the transferee, he may assume such liability by a collateral agreement, either written or oral; (Schmucker v. Sibert, 18 Kans. 104; Strohauer v. Voltz, 42 Mich. 444; Merriman v. Moore, 90 Pa. St. 78; Wright v. Briggs, 99 Ind. 563; Bowen v. Kurtz, 37 Iowa 239; Bolles v. Beach, 22 N. J. Law 680; Society of Friends v. Haines, 47 Ohio St. 423) and, according to a number of decisions, such an agreement is implied from the fact that, when a purchaser has agreed to pay a particular sum for the mortgaged land, the amount of the mortgage is deducted from this sum in fixing the amount actually paid by him, and the land is conveyed to him subject to the mortgage. (Twitchell v. Mears, Fed. Cas. No. 14,286; Townsend v. Ward, 27 Conn. 610; Comstock v. Hitt, 37 Ill. 542; Bristol Sav. Bank v. Stiger, 86 Iowa 324; Tichenor v. Dodd, 4 N. J. Eq. 454; Heid v. Vreeland, 30 N. J. Eq. 591; Rockwell v. Blair Sav. Bank, 31 Nebr. 128, as explained in Green v. Hall, 45 Nebr. 89; Thompson v. Thompson, 4 Ohio St. 333. But see Belmont v. Coman, 22 N. Y. 438; Bennett v. Bates, 94 N. Y. 354; Fiske v. Tolman, 124 Mass.

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der the assumption contained in the deed from the executors of Williams, for it does not appear that they were liable to indemnify their grantor. Each grantee who assumed the payment of the mortgages was bound thereby only to indemnify, and if no liability to pay the mortgage debt existed on the part of his immediate grantor, there is no ground for claim of indemnity on the part of the grantor, and, consequently, no personal liability on the part of the grantee to pay the mortgage debt.

The fact that it does not appear that Pflaum was personally liable to pay the mortgage debt, is fatal to the claim of the complainants against the demurrant.

The demurrer will be sustained, with costs.[5]

HARE v. MURPHY.

SUPREME COURT OF NEBRASKA, 1895.
45 Nebr. 809.

HARRISON, J. The plaintiff, as assignee and owner of two promissory notes, and a mortgage on certain real estate given to secure their payment, instituted this action against the defendant, to whom the real estate had been sold by the grantee or party purchasing from the mortgagor, to recover the amount due upon the notes and mortgage, basing the suit upon a clause in the conveyance of the lands to defendant, by which it is claimed defendant assumed and agreed on his part to pay the mortgage indebtedness. * * * * * There was a trial of the issues to the court and a jury, and at the close of the testimony the trial judge instructed the jury to return a verdict for defendant, which instruction was complied with by the jury, and after motion for new trial heard and overruled, judgment was rendered, and the plaintiff brings the case here by petition in error.

Counsel for the parties, in the briefs filed, agree in the statement that the trial judge was moved to instruct the jury to return a verdict for the defendant by the following considerations: That the petition did not allege, and the evidence failed to show, that defendant's grantor was in any manner or to any extent connected

254; Granger v. Roll, 6 S. Dak. 611; Moore's Appeal, 88 Pa. St. 450.)" Tiffany, Real Property, § 526.

For a discussion of the construction of various unusual and more or less ambiguous stipulations, such as that of "subject to the payment of, &c.," see Jones, Mortgages, § 749.

[5] Compare Ward v. De Oca, 120 Cal. 102. As to whether the grantee's promise is one of indemnity only, see Williston's Wald's Pollock on Contracts, 268-270.

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with the mortgage debt, or liable or bound for the payment of it; that the rule of law applicable and governing in such cases is that a mortgage indebtedness assumption clause in a deed, or an agreement by the purchaser of lands to pay incumbrances existing against their lands, will not become operative, or is of no validity, and cannot be enforced by the mortgagee, unless it further appears that the grantor in the conveyance, or the person to whom the promise is made, was personally liable for the payment of the mortgage debt. In adopting this view of the law, we think, the learned judge who presided during the trial in the district court erred. It is undoubtedly supported by decisions, many of which are cited by counsel for defendant in their brief, of courts of last resort, the opinions of which, as authority, rank among the very highest and are entitled to great weight, but we do not think best to follow them. It is an established rule of law that where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him. (Shamp v. Meyer, 20 Neb. 223; Sample v. Hale, 34 Neb. 220; Barnett v. Pratt, 37 Neb. 349; Doll v. Crume, 41 Neb. 655.) In Keedle v. Flack, 27 Neb. 836, a case in which the right of a mortgagee to enforce such a promise as the one in the case at bar was in controversy, the rule just quoted was applied and held to be the basis of the mortgagee's right to recover. Where a party, purchaser of lands, agrees as a part of the contract of purchase to assume and pay a mortgage debt existing against the lands, the promise so to do is for the benefit of the owner and holder of the debt and may be enforced by such party. The purchase price of the lands is the consideration moving between the purchaser and his grantor, and it is immaterial and of no consequence to the grantee that his grantor may or may not be personally liable or bound for the payment of the mortgage debt, and by such promise the promisor becomes personally liable to the mortgagee, or assigns, for the mortgage debt, regardless of whether his grantor was so liable or not. (Merriman v. Moore, 90 Pa. St., 78; Dean v. Walker, 107 Ill., 540; Bay v. Williams, 1 N. E. Rep. (Ill.), 340.)

There are some issues of fact in regard to which the evidence was conflicting, and if the view of the law with reference to the liability of a grantee who assumes and agrees to pay a mortgage debt, which we have announced herein as the correct one, had been taken, they should, and doubtless would, have been submitted, under proper instructions, to the jury for their consideration and determination. It follows that the judgment of the district court will be reversed and the cause remanded for further proceedings.

Reversed and remanded.[6]

[6] See also, Dean v. Walker, 107 Ill. 540; Marble Sav. Bank v. Mesarvey, 101 Iowa 285; Enos v. Sanger, 96 Wis. 150.

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GARNSEY v. ROGERS.

COURT OF APPEALS OF NEW YORK. 1872.
47 N. Y. 233.

On and prior to the 23d of January, 1861, the plaintiff, Lewis R. Garnsey, was the owner of two mortgages upon the premises described in the complaint, one of which was given to him directly, and the other of which he had acquired by purchase and assignment from the original mortgagee named therein. At the date above mentioned, the premises covered by these mortgages were owned by the defendant, Richard M. Hermance, who had assumed and agreed to pay them. At this time they amounted together to the sum of $2,000, besides an accumulation of interest.

On the 23d of January, 1861, Hermance was indebted to the defendant, Harvey J. Rogers, in the sum of $650. For the purpose of securing the payment of this sum, Hermance executed and delivered to Rogers a deed of the premises covered by the mortgages, containing a covenant on the part of Rogers that he would assume and pay the said mortgages. This deed was given, however, upon the parol condition that whenever Hermance should pay the said $650 and interest to Rogers, the premises should be reconveyed by Rogers to Hermance.

On the 1st of August, 1866, Hermance gave to Rogers his note for $700, and on the same day Rogers reconveyed the premises to Hermance by deed, in which Hermance covenanted to reassume and pay these mortgages.

Upon these facts the referee found, as a conclusion of law, that in case the amount of the mortgages could not be collected from a sale of the land itself, nor from the defendant Hermance, then and in that case the defendant Rogers, was liable for the same. To this conclusion the defendant, Rogers, excepted.

Upon the report of the referee, judgment was entered charging the defendant, Harvey J. Rogers, with any deficiency which might arise upon the sale of the mortgaged premises, in case such deficiency could not be collected of the defendant, Hermance. From this portion of the judgment, the defendant, Rogers, appealed.

RAPALLO, J.:

* * * * * *

The cases to which reference has been made, exhibit, I believe, every ground upon which it has been hitherto claimed that a grantee,

Compare, Vrooman v. Turner, 69 N. Y. 280; Brown v. Stillman, 43 Minn. 126.

For a general discussion of beneficiary contracts, see Williston's Wald's Pollock on Contracts, 237-278.

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who, by agreement with his grantor assumes the payment of an existing mortgage on the premises conveyed, becomes personally liable to the mortgagee; and the material question now to be considered is, whether the principles of any of these cases apply to such an agreement, when contained, not in an absolute conveyance, but in a mortgage, or in a conveyance which, in equity, amounts only to a mortgage, and impose upon the second mortgagee making such an agreement, an absolute, continuing, personal liability, which can be enforced by the first mortgagee against the second.

The conveyance from Hermance to Rogers is found by the referee to have been intended only as a security for an existing debt, and accompanied by an agreement for redemption, and must in equity be treated as a mortgage and nothing more. The covenant therein, whereby Rogers assumed the payment of the prior mortgages held by the plaintiff, should therefore be construed as if contained in a mortgage. It having been established, by repeated adjudications, that a deed, though absolute on its face, may be proved by parol to have been given as security for a debt, and that when that fact is established it is defeasible by redemption, and vests in the grantee only the rights of a mortgagee, consistency requires that the character thus given to the instrument should affect all its parts, and that the obligations which it purports to impose upon the grantee should have no greater effect than if the defeasance, which is proved by parol, had been incorporated in the instrument; especially when third parties claim equitable rights under such covenants.

Assuming for the moment that in such a case the agreement of the grantee or mortgagee to pay off prior incumbrances is founded upon a sufficient consideration, it is still difficult to see how it can be brought within the principle of the earlier cases cited, they being all founded upon the doctrine that as between the grantor and grantee the latter becomes the principal debtor for the mortgage debt, which has been allowed him out of the purchase-money. Where he takes only a mortgage he owes no money for the land, which he can promise to pay to the prior mortgagee, for he does not acquire title to the land. To become a debtor to any one, he must owe a debt. Where he buys the land absolutely for a stipulated price, and instead of paying the whole of it to his grantor, he is allowed to retain a part, which he agrees to pay to a creditor of the grantor having a lien upon the land, the amount which he thus agrees to pay is his own debt, which by arrangement with his grantor he has agreed to pay to the creditor of the latter, and although this arrangement, not being assented to by the creditor, does not discharge the grantee from liability, yet as between him and the party who has thus assumed it, the grantor is a mere surety. If the grantee pays it, he pays only what he agreed to pay for the land, and pays it in the manner agreed upon. And there is no hardship in allowing

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either the grantor or the mortgagee to enforce its payment. But in the case of a party having the land merely as security, such an undertaking is simply a promise to advance money to pay the debt of his grantor or mortgagor, which money when advanced the junior mortgagee can collect under his mortgage. (Western Ins. Co. v. Village of Buffalo, 1 Paige, 284.) If Rogers had paid the liens in question, and on a foreclosure of his own mortgage the premises had not brought enough to satisfy it, together with the sums paid by him to discharge the prior liens, Hermance would have been liable to him for the deficiency.

Where a party, taking from his debtor a lien on property subject to prior liens, assumes and pays them off, he is certainly entitled to add the amounts so paid to his original debt; the payments, though made in pursuance of his agreement, are made for the benefit of the debtor, and upon his debts, and to protect him and his property. It is obvious that an agreement of this character is a mere agreement to advance, and not a security in the hands of the grantor as surety, available to the parties in whose favor the prior liens exist, on the ground of equitable subrogation.

The judgment cannot be sustained on the principles which prevailed prior to the case of Burr v. Beers (24 N. Y. 178), and the next inquiry is whether it can be sustained on the doctrine of that case.

Was this a promise made to Hermance for the benefit of the plaintiff? I do not understand that the case of Lawrence v. Fox has gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being privy neither to the contract nor the consideration. To entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited; and all that the case of Lawrence v. Fox decides is, that where one person loans money to another, upon his promise to pay it to a third party to whom the party so lending the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the latter can maintain an action upon it without proving an express promise to himself from the party receiving the money. Johnson, C. J., and Denio, J., placed their votes upon the distinct ground that the contract could be regarded as having been made by the debtor as the agent of his creditor, and that the latter could ratify the contract thus made for his benefit. In Burr v. Beers (24 N. Y. 178), the amount due upon the mortgage was reserved out of the purchase-money and left in the hands of the purchaser, upon his agreement with the vendor to apply it to the payment of the mortgage debt. The purchaser was bound to pay the whole price, but by this agreement a portion of it was set apart for the use of the mortgagee, and the purchaser undertook to pay it to the mortgagee, and no one

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else. No other person was entitled to receive it. That arrangement was regarded as a contract made for the benefit of the mortgagee, and it was held that he could enforce it. In that case the purchase-money was in fact a fund in the hands of the purchaser, which he had agreed to apply to the use of the mortgage creditor. In performing that agreement he would have done nothing more than to pay his own debt in the manner in which he had agreed to pay it.

But in the present case the agreement was not to apply money which the promisee delivered for the purpose or which was due him from the promisor, to the use of a third party, but the promisor engaged to advance his own money for the purpose of protecting the property of the promisee, which advance when made would become a lien on the property of the promisee. Regarding the conveyance as a mortgage, the stipulation was in effect to advance to the promisee on the security of the property, to discharge prior liens, and was made for the benefit of the promisee only.

If such a contract could be enforced by the creditor who would be incidentally benefited by its performance, every agreement, by which one party should agree with another, for a consideration moving from him, to become security for him to his creditors, or to advance money to pay his debts, could be enforced by the parties whose claims were thus to be secured or paid. I do not understand any case to have gone this length. This is not the case of a trust. If the property had been conveyed to Rogers in trust, to pay the plaintiff's claims, the legal estate would have vested in Rogers, and he would have been compelled to execute the trust. But no such trust was declared in the deed, nor could it be created by parol, as to real estate.

It must further be considered, that, where such an assumption is made on an absolute conveyance of land, it is unconditional and irrevocable. The grantor cannot retract his conveyance, or the grantee his promise or undertaking; but, when contained in a mortgage, the conveyance is defeasible. The grantor reserves the right to annul it by paying his debt, and, when he does so, he discharges the agreement to pay the prior mortgage. The reservation of this right is inconsistent with the idea that the assumption by the grantee was for the benefit of the prior mortgagee; for, if it were, the grantor would have no control over the rights thus acquired by a third party. The reservation of this control by the grantor shows that the agreement was for his benefit only, and prevents its enuring to the benefit of any third party. In the present case, the control had actually been exercised, and the grantor had redeemed and resumed the enjoyment of his property, in pursuance of the condition, before this action was commenced, and the grantee had ceased to have any interest in or claim upon it.

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I am not quite prepared to hold that the agreement of the defendant, to pay the prior mortgages, was absolutely void for want of consideration.

In the case of Ricard v. Sanderson, 41 N. Y. 179, the property was placed in the hands of Sanderson for the purpose of securing debts due not only by the grantor, but by others, and not to Sanderson individually, but to a firm of which he was a member. The agreement was in writing, and its terms are not given in the case as reported, and it may be that they created a trust in Sanderson, and that the legal title was vested in him. Moreover, the case does not show that the instrument or the title, or possession of Sanderson under it, had at the time of the recovery against him been extinguished or terminated in pursuance of any condition to which it was subject.

It may be that constituting Rogers mortgagee in possession, of real estate exceeding in value the amount of his debt, was a consideration for the undertaking of Rogers to advance the money necessary to pay off the prior liens, and that while the mortgage remained in force, and Rogers continued in possession, Hermance could have compelled the performance of that agreement for the protection of his own estate. It is true that the giving of the security was less, so far as the defendant was concerned, than Hermance was already under a legal obligation to do. It was not so beneficial to the defendant as would have been the payment of his claim. But at the same time it was an act which Hermance was not legally bound to perform, and which might be prejudicial to him; and it was not unreasonable that when he parted with the possession of his property, and added to the previous incumbrances thereon, thus disabling himself from protecting it, he should exact of the party to whom he thus gave it as security, that he should protect it; and the latter may have been willing to bind himself to do that which, without any agreement, he might have been obliged to do to protect his own security. A stipulation by a mortgagee in possession to keep down prior mortgages, taxes, etc., might, perhaps, be enforced by the mortgagor. But when the mortgage is canceled, and the mortgagor is restored to the enjoyment of the property, such stipulations are extinguished with the mortgage.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.[7]

[7] See Williston's Wald's Pollock on Contracts, 265, 266. As to the effect, upon the liability of an assuming grantee to the mortgagee, of a release by the grantor, see Bay v. Williams, 112 Ill. 91; Gifford v. Corrigan, 117 N. Y. 257; Crowell v. Hospital, 27 N. J. Eq. 650; Youngs v. School Trustees, 31 N. J. Eq. 290. And see Williston's Wald's Pollock on Contracts, 273.

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McLENNAN, J., in HYDE v. MILLER, 45 Hun 396. (N. Y. Sup. Ct., 1899.) As between the mortgagor, who is the plaintiff in this action, and the defendant Miller, her grantee, he by assuming the payment of the mortgage by his agreement contained in the deed of conveyance to him, became the primary debtor and the plaintiff his surety. (Calvo v. Davies, 73 N. Y. 211; Johnson v. Zink, 51 *id.* 336; Marshall v. Davies, 78 *id.* 421; Mutual Life Insurance Co. v. Davies, 12 J. & S. 172; Blyer v. Monholland, 2 Sandf. Ch. 478.)

* * * * * * *

It is equally well settled that by the acceptance of the conveyance to him from the defendant Miller, the defendant Oldfield became liable to the mortgagee and also to the mortgagor, for any deficiency which might arise upon the sale of the mortgaged premises. (Ferris v. Crawford, 2 Den. 595.)

The mortgagee Bird, when his mortgage became due and payable, had a right to commence an action to foreclose the same, and to make all persons parties who had, subsequent to the date of record of his mortgage, acquired any interest in the premises, and to recover judgment for deficiency against this plaintiff, the mortgagor, against her grantee, the defendant Miller, against Miller's grantee, Oldfield, and against Oldfield's grantee, Elizabeth Bennett.

Bird also had the right to demand and to recover judgment for deficiency against any one of such parties, and the action of Bird in that regard could in no way affect the rights of such parties as between themselves. If judgment for deficiency had only been demanded and recovered against the plaintiff in this action she could not have complained, but would have had the right immediately to commence an action against Miller to recover the amount paid by her upon such judgment.

If the plaintiff in that action had recovered judgment for deficiency against Miller, he in turn could have recovered the amount thereof from Oldfield, and so Oldfield could recover from Elizabeth Bennett. So far as Bird was concerned, each of the defendants in the action above named was jointly and severally liable to him, and it was entirely optional with him whether he would pursue them all, or, if any, which one or more he would seek to recover against.[8]

[8] This was an action by the mortgagor against her grantee, Miller, and Miller's grantee, Oldfield, each of whom had assumed the payment of the mortgage, to recover the amount which the plaintiff had paid upon a deficiency judgment recovered against her by the mortgagee. A verdict against both defendants was directed by the court and the judgment rendered thereon was affirmed in the Appellate Division of the Supreme Court, McLennan delivering an opinion from which the above excerpt was taken. The defendants seem not to have questioned the positions quoted, but claimed that the plaintiff had been discharged from liability to the mortgagee at the time of her payment, so that her pay-

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CALVO v. DAVIES.

COURT OF APPEALS OF NEW YORK, 1878.
73 N. Y. 211.

This action was brought to foreclose a mortgage. The complaint alleged in substance the execution of the mortgage by defendant Davies and wife as collateral security for the bond of Davies, the assignment of the bond and mortgage to plaintiff, and that there had been a default, and that there was a specified amount due and unpaid thereon. The complaint further alleged that defendant Davies and wife conveyed the premises to defendant Leslie, who took the conveyance subject to the mortgage, and in and by the conveyance assumed and agreed to pay the same; that on the 21st day of November, 1872, by an agreement between plaintiff and Leslie, "the time for the payment of the principal sum aforesaid was extended from the 8th day of March, 1872, to the 15th day of October, 1874, with the express understanding that the said bond and the mortgage should remain in every other respect unaffected by said agreement;" also, that Leslie subsequently conveyed the premises to defendant Woodruff. Plaintiff asked judgment for any deficiency against defendants Davies and Leslie.

Defendant Davies demurred, on the ground that the complaint as to him did not state facts sufficient to constitute a cause of action.

ANDREWS, J. The mortgaged premises became, on the conveyance by Davies to Leslie of the equity of redemption, as between Davies and his grantee, the primary fund for the payment of the mortgage; but the right of the mortgagee to resort to the bond for the collection of his debt was not affected or impaired by the conveyance. Davies could not, by any dealing or contract with Leslie,

ment was voluntary and would not support the recovery sought. The opinion of the court on this part of the case is omitted. The decision was affirmed without opinion in 168 N. Y. 590.

Compare Flint v. Cadenasso, 64 Cal. 83; Stover v. Tompkins, 34 Nebr. 465.

"Where there are successive grantees of mortgaged premises, each assuming payment of the mortgage debt, the decree for a deficiency should determine and adjudge the order of the liability of the several grantees, especially where matters occurring between the parties may require a marshalling of securities. As a general rule, where there are successive transfers of the mortgaged premises, with an assumption of the mortgage debt, it will, as between the successive grantees, be cast upon them in the inverse order of the conveyances. But where the intermediate grantees have executed releases to each other, the liability of the parties may be in a different order, even where the releases may be impeached for fraud upon creditors. A voluntary conveyance or release, though it be void as to creditors, is valid as between the parties to it." Depue, J., in Youngs v. School Trustees, 31 N. J. Eq. 290.

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change the rights of the creditor to proceed on the bond, or compel him to resort in the first instance to the land. (Marsh v. Pike, 10 Paige, 595.) On the other hand Davies relation to the debt was not changed by his conveyance so as to take away his right as debtor, to pay the debt at any time after it became due, and upon his paying the debt, either voluntarily or by compulsion, he would, upon the doctrine of equitable subrogation, be entitled to be substituted to the mortgage security as it originally existed, with the right to proceed immediately against the land for his indemnity. (Tice v. Annin, 2 J. Ch., 125; Vanderkamp v. Shelton, 11 Paige, 28; Marsh v. Pike, supra.) The mortgagee, after the conveyance by Davies, could not deal with the grantee of the equity of redemption, to the prejudice of his right of subrogation, without discharging Davies from liability for the debt, either wholly or pro tanto. If, for example, he had, pursuant to an agreement with Leslie, without the consent of Davies, satisfied or released the lien of the mortgage it is plain that he would thereby, as to Davies, have discharged the debt, at least to the extent of the value of the land. The rule that a mortgagee is bound, in dealing with his security and with the bond, to observe the equitable rights of third persons, of which he has notice, has been frequently recognized. (Tice v. Annin, supra; Halsey v. Reed, 9 Paige, 446; Stevens v. Cooper, 1 J. Ch., 425; Howard Ins. Co. v. Halsey, 8 N. Y. 271.) And the doctrine that a surety is discharged by dealings between the creditor and principal debtor, inconsistent with the rights of the surety, has been applied, although the creditor did not know, in the origin of the transaction, that one of the parties was a surety, and also when, by an arrangement between two original joint and principal debtors, one of them assumed the entire debt, and this was known to the creditor. (Pooley v. Harradine, 7 El. & Bl., 431; Oriental Financial Corporation v. Overend, Gurney & Co., L. R. 7 Ch. App. 142; Millerd v. Thorn, 56 N. Y., 402; Colgrove v. Tallman, 67 id., 95.)

We think it must be held, upon the authorities, that the rights of the parties in this case are to be determined by the rules governing the relation of principal and surety, and that if the dealings between the mortgagee and Leslie would have discharged Davies, if he had been originally bound as surety only, the action against him cannot be maintained. (Halsey v. Reed, 9 Paige, supra; Burr v. Beers, 24 N. Y., 178; Flower v. Lance, 59 *id.*, 603.)

That an agreement by the creditor with the principal debtor, extending the time for the payment of the debt, without the consent of the surety, discharges the latter, is established by numerous authorities, and the court will not enter into the question, what injury the surety has sustained. (Rees v. Berrington, 2 Ves. Jr., 540; Rathbone v. Warren, 10 J. R., 587; Miller v. McCan, 7 Paige, 452.) The plaintiff, in her complaint in this case, sets forth facts which

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justify a judgment of foreclosure; but she also demands a judgment for any deficiency against the defendant Davies. The defendant Davies interposed a general demurrer to the complaint. The complaint avers the making of the bond and mortgage by Davies, its assignment to the plaintiff, the conveyance by Davies to Leslie in November, 1871, of the equity of redemption, subject to the mortgage, and his agreement to pay the same, and the amount due and unpaid thereon. If the plaintiff had stopped here a cause of action against the defendant Davies would appear in the complaint; but she further alleges that in November, 1872, by an agreement made by the plaintiff with the defendant Leslie, the time for the payment of the debt was extended from March 8, 1872, to October 15, 1872, "with the express understanding that the bond and mortgage should remain in every other respect unaffected by the agreement."

The agreement, if construed as an absolute agreement for the extension of the time of payment of the mortgage, prima facie operated to discharge Davies from liability on his bond. It was valid and binding between the parties, and the mortgage could not be enforced during the time covered by the agreement, either by the plaintiff or by Davies. Davies, on paying the debt, would be entitled to be subrogated to the security, but he would stand in the place of the creditor, and would take the mortgage subject to the agreement. (Ducker v. Rapp, 67 N. Y., 471; Bangs v. Strong, 10 Paige, 11.) The learned counsel for the plaintiff contends that the agreement as alleged reserves the right of the creditor against Davies. When, in an agreement between a creditor and the principal debtor extending the time of payment, the remedies against the surety are reserved, the agreement does not operate as an absolute, but only as a qualified and conditional suspension of the right of action. The stipulation in that case is treated in effect as if it was made in express terms, subject to the consent of the surety, and the surety is not thereby discharged. (Story's Eq. Jur., sec. 326; Bangs v. Strong, 10 Paige, 18; Kearsley v. Cole, 16 M. & W., 128; Oriental Financial Corporation v. Overend, Gurney & Co., 7 H. of L. Cas., 348; Morgan v. Smith, 70 N. Y. 537.) But we are of opinion that the agreement alleged does not bring the case within the principle of these decisions.

The "understanding" that the mortgage should in all other respects remain unaffected by the agreement, except as to the time of payment, emphasizes the one purpose of the agreement, viz., to extend the time of payment. The other stipulations in the mortgage were to remain in force as if the agreement extending the time had not been made. It would be a forced and unnatural construction to hold that the parties designed to reserve to the creditor a right to proceed at once against Davies, which would enable the plaintiff

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to defeat the sole purpose of the agreement. The court in Claggett v. Salmon (5 Gill. & Jo., 314) affirmed the decree of the chancellor, who held that the extension relied upon in that case was consistent with the obligation entered into by the sureties, and the agreement expressly provided that it should not interfere with or invalidate the liability of the sureties on the mortgage executed by them.

The further point is taken by the plaintiff that the averment of the agreement of extension may be rejected, leaving it for the defendant to bring the agreement to the notice of the court by answer. But we think the whole complaint is to be considered in determining whether it states a cause of action, as well the allegations which tend to discharge the defendant Davies, as those which tend to charge him.

These views lead to an affirmance of the judgment.

All concur, except Miller, J., absent.

Judgment affirmed.[9]

[9] For collection of authorities, see Williston's Wald's Pollock on Contracts, 264.

"By the settled law of this court, the grantee is not directly liable to the mortgagee, at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. Keller v. Ashford, 133 U. S. 610; Willard v. Wood, 135 U. S. 309. In that view of the law, there might be difficulties in the way of holding that a person who was under no direct liability to the mortgagee was his principal debtor, and that the only person who was directly liable to him was chargeable as a surety only, and consequently that the mortgagee, by giving time to the person not directly and primarily liable to him, would discharge the only person who was thus liable. Shepherd v. May, 115 U. S. 505, 511; Keller v. Ashford, 133 U. S. 610, 625." Gray, J., in Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 187, holding that under the law of Illinois the grantor is discharged by an extension of time to the grantee without the grantor's consent.

"While in equity as between the parties to the deed the vendor is regarded as the surety, and the vendee as the principal debtor, the mortgagee may treat them both as principal debtors as to him and have a personal decree against either or both. And until he has done some act, or it in some manner sufficiently appears that he recognizes the purchaser or vendee as the principal and the original mortgagor as surety merely, both of them will as to such mortgagee be treated as principals. * * * But it is claimed, that the extension of time to Hopkins for valuable consideration was in equity treating him as the principal debtor, and Waterman as the surety. * * *

"The language of the agreement is quite as consistent with the idea that the mortgagee still regarded the mortgagor liable as a principal, as that he designed placing him in the position of or recognizing him as a surety, and there is nothing in it from which the mortgagor could be led to infer that he was to be so treated, or that he was likely to be misled thereby.

"There was no such agreement however between the parties, as made Hopkins the debtor of Corbett, to the extent that Waterman could not

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MURRAY v. MARSHALL.

COURT OF APPEALS OF NEW YORK, 1884.
94 N. Y. 611.

This action was upon a bond executed by defendant to plaintiffs' testator. The answer averred, and the court found in substance, that at the time the bond was executed, a mortgage was also executed by defendant to secure the payment thereof; that thereafter defendant sold and conveyed the mortgaged premises subject to said mortgage; that plaintiffs' testator, in consideration of the payment to him by the grantee of $500 of the principal and of the interest due upon the bond and mortgage, executed and delivered to said grantee, without the knowledge or assent of defendant, an instrument under seal, extending the time of payment of the balance unpaid for three years, whereby the answer claimed, and the trial court found defendant was released and discharged from all liability.

FINCH, J. The trial court held, that the extension by plaintiffs' testator of the time of payment of defendant's bond and mortgage, by a valid agreement with her grantee, who had taken a deed subject to the mortgage but without assuming its payment, operated to discharge the defendant wholly from liability. This conclusion rested upon the rule applicable to principal and surety, which forbids the former to change the essential terms of the contract without the consent of the latter, except at the peril of the surety's complete discharge. In most of these cases the courts have refused to enter upon the inquiry whether the surety was damaged or not by the change, and the justification of such refusal ordinarily lies in the fact that the surety is bound only by the contract which he made, and not by the new and substituted one which alone can be legally enforced. (Ducker v. Rapp, 67 N. Y. 473.) But the present is not a case of principal and surety in the strict and technical definition of such relation; and upon that fact the General Term founded a different view of the rights of the parties, and reversed the decision of the Special Term on appeal. Conceding that, by the conveyance subject to the mortgage, the land became the primary

interfere and control for the protection of his own rights. Thus we see no reason why Waterman could not have sued Hopkins at any time after the maturity of the note to Corbett and compelled him to pay by virtue of his promise and undertaking as recited in the deed." Wright, J., in Corbett v. Waterman, 11 Iowa 86. See also Iowa Loan & Trust Co. v. Haller, 119 Iowa 645; Crawford v. Edwards, 33 Mich. 354.

Compare Travers v. Dorr, 60 Minn. 173.

Compare with the principal case Goodyear v. Goodyear and Dickason v. Williams, supra.

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fund for the payment of the mortgage debt, and that the grantor in defense of his liability on the bond had the right to pay the mortgage debt and be subrogated to the remedies of the creditor, and so could enforce payment out of the land to the extent of its value. (Johnson v. Zink, 51 N. Y. 336; Flower v. Lance, 59 *id.* 603), the General Term nevertheless held, affirming the authority of Penfield v. Goodrich (10 Hun, 41), that the mortgagor and grantor was all the time the principal debtor, and the grantee only became such when he covenanted to pay the mortgage debt and assumed it as a personal liability. We do not approve of this conclusion, or the result to which it leads, and deem it our duty to affirm the decision of the Special Term, although not approving the doctrine upon which it rests, except with some necessary qualification.

While, as we have said, no strict and technical relation of principal and surety arose between the mortgagor and his grantee from the conveyance subject to the mortgage, and equity did arise which could not be taken from the mortgagor without his consent, and which bears a very close resemblance to the equitable right of a surety, the terms of whose contract have been modified. We cannot accurately denominate the grantee a principal debtor, since he owes no debt, and is not personally a debtor at all, and yet, since the land is the primary fund for the payment of the debt, and so his property stands specifically liable to the extent of its value in exoneration of the bond, it is not inaccurate to say that as grantee, and in respect to the land, and to the extent of its value, he stands in the relation of a principal debtor, and to the same extent the grantor has the equities of a surety. This follows inevitably from the right of subrogation which inheres in the original contract of sale and conveyance. It is a definite and recognized right, which, in the absence of an express agreement, will be founded upon one implied. (Gans v. Thieme, 93 N. Y. 232.) When the mortgagor in this case sold expressly subject to the mortgage, remaining liable upon his bond, he had a right as against his grantee to require that the land should first be exhausted in the payment of the debt. Presumably the amount of the mortgage was deducted from the purchase-price, or at least the transfer was made and accepted in view of the mortgage lien. Seller and buyer both acted upon the understanding that the land bound for the debt should pay the debt as far as it would go, and their contract necessarily implied that agreement. Through the right of subrogation the vendor could secure his safety, and that right could not be invaded with impunity. It was invaded. When the creditor extended the time of payment by a valid agreement with the grantee, he at once, for the time being, took away the vendor's original right of subrogation. He suspended its operation beyond the terms of the mortgage. He put upon the mortgagor a new risk not contemplated, and never consented to. The value of

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the land, and so the amount to go in exoneration of the bond, might prove to be very much less at the end of the extended period than at the original maturity of the debt, and the latter might be increased by an accumulation of interest. The creditor had no right thus to modify or destroy the original right of subrogation. What he did was a conscious violation of this right, for the fact that he dealt with the grantee for an extension of the mortgage shows that he knew of the conveyance, and that it left the land bound in the hands of the grantee. Knowing this he is chargeable with knowledge of the mortgagor's equitable rights, and meddled with them at his peril. But it does not follow that the vendor was thereby wholly discharged. The grantee stood in the quasi relation of principal debtor only in respect to the land as the primary fund, and to the extent of the value of the land. If that value was less than the mortgage debt, as to the balance he owed no duty or obligation whatever, and as to that the mortgagor stood to the end, as he was at the beginning, the sole principal debtor. From any such balance he was not discharged, and as to that no right of his was in any manner disturbed. The measure of his injury was his right of subrogation, and that necessarily was bounded by the value of the land. The extension of time, therefore, operated to discharge him only to the extent of that value. At the moment of the extension his right of subrogation was taken away, and at that moment he was discharged to the extent of the value of the land, since the extension barred his recourse to it, and once discharged he could not again be made liable. From that moment the risk of future depreciation fell upon the creditor who by the extension practically took the land as his sole security to the extent of its then value, and assumed the risk of getting that value out of it in the future. But the Special Term went further and held that the mortgagor was absolutely discharged by the extension. That might or might not be, and depended upon the question whether the value of the land equalled or fell below the debt. For conceding the general rule that the surety is discharged utterly by a valid extension of the time of payment, and that the mortgagor stands in the position and has the rights of a surety; it must be steadily remembered that he can only be discharged so far as he is surety; that he holds that position only up to the value of the land; and beyond that is still principal debtor without any remaining equities.

In this case the evidence is not before us. We have only the pleadings and the findings of the court. They do not show directly that the value of the land at the date of the extension equaled the mortgage debt. But two things go far to justify such an inference. No claim that the value was less, and that the surety was only partially discharged appears to have been made on the trial. There was no request for such a finding, and the case seems to have

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been heard on the assumption that the value equalled the amount of the mortgage debt. But a very significant fact is found by the trial court. The grantee obtained the extension complained of by paying upon the mortgage the sum of $500 of principal and $87 of accrued interest. He was under no obligation to make this payment or procure the extension. The act is unexplainable except upon the theory that he deemed the land worth more than the mortgage, and that his interest was to pay off the incumbrance. It is an act which speaks as plainly as if he had said and the court had found that he had said that the land exceeded in value the amount of the mortgage. Every legitimate inference which the findings warrant, must be drawn to sustain the judgment founded upon them. In Kellogg v. Thompson (66 N. Y. 88) it was said that where the evidence given on the trial was not contained in the case, we must assume not only that the facts proved were sufficient to sustain the findings, but also any additional findings necessary to sustain the conclusion of law not in conflict with the affirmative facts found. That, in the present case, the value of the land equaled the amount of the mortgage debt, is a fair inference from the facts which were found, is strengthened by the course of the trial so far as the absence of any such objection is concerned, and under the rule to which we have referred must be assumed in support of the judgment of the Special Term.

The judgment of the General Term should be reversed and that of the Special Term affirmed with costs.

All concur.

Judgment accordingly.[10]

COYLE v. DAVIS.

SUPREME COURT OF WISCONSIN, 1866.
20 Wis. 564.

[One Jarman, being the owner of certain parcels of land, made several mortgages thereon and then, on July 12, 1862, conveyed a part of said land to the plaintiff and another part to plaintiff's

[10] Compare, Chilton v. Brooks, 72 Md. 554; Travers v. Dorr, 60 Minn. 173; Bunnell v. Carter, 14 Utah 100.

That the grantor, "subject to" the mortgage, upon paying the debt is subrogated to the mortgagee's rights against the land, was held in Kinnear v. Lowell, 34 Maine 299; Pratt v. Buckley, 175 Mass. 115 (semble); Greenwell v. Heritage, 71 Mo. 459; Johnson v. Zink, 51 N. Y. 333. See also In re Wisner, 20 Mich. 442; Manwarring v. Powell, 40 Mich. 371.

Compare Arnold v. Green, Hartshorne v. Hartshorne and Spencer v. Harford, supra; and cases cited thereto.

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husband, the conveyances being warrany deeds which were recorded in September, 1862. On July 12, 1864, defendant Edward Davis purchased from Jarman the equity of redemption of the whole of said mortgaged lands, and at the same time the agreement referred to in the opinion was made between Jarman and the defendants Edward Davis and Joseph Davis, the latter being at that time the owner of three of the mortgages, of which one had been executed to him, and the others, executed to one Griffiths and one Prentiss, respectively, had been assigned to him. There was no connivance or understanding between the said Edward and Joseph to injure the plaintiff. The plaintiff sought by this suit to have the lands which were conveyed to her and her husband, in the latter of which she claimed dower, discharged of the said mortgages. The foregoing facts being found by the court or admitted by the pleadings, judgment was rendered for the defendants, from which plaintiff appealed.]

DIXON, C. J. * * *

* * * * * * *

The court also found that at the time of the conveyance of the equity of redemption by Richard Jarman to the defendant, Edward Davis, it was verbally agreed between Jarman and the defendants, Joseph and Edward Davis, that Jarman should be released from all personal liability to pay the amounts secured by the mortgages, and that Joseph Davis should rely upon Edward Davis and the lands described therein for the payment of the same. This finding is fully justified by the evidence, and its correctness not questioned by the counsel for the defendants. Upon this finding, we think the judgment must be reversed, and that upon the cause being remanded the plaintiff will be entitled to judgment in her favor for the relief demanded in the complaint as to the mortgages owned by the defendant Joseph Davis, namely, the mortgage to himself and the Griffiths and Prentiss mortgages. The mortgage to Daniel Davis, it seems, was never owned by Joseph, and consequently his agreement to release the personal liability of Jarman can have no effect upon that mortgage in the hands of Daniel.

Our reasons for this opinion are the same urged by the counsel for the plaintiff, and may be thus stated. The plaintiff and her husband, by their purchase of a portion of the mortgaged premises, acquired the right to redeem from all the mortgages, by paying the entire mortgage debt, and then to obtain satisfaction by the foreclosure and sale of the residue of the premises, and if they proved insufficient, to resort to the personal liability of Jarman, the mortgagor. This right of action against Jarman personally, either before or after foreclosure and sale, was or might have been a very valuable right; and after the death of her husband and before the conveyance to Edward Davis and the release by Joseph, the plaintiff

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was in a situation to have acquired it, both as to the land conveyed to her husband and as to that conveyed to herself. By the release, Joseph Davis, with full knowledge of the facts, deprived her of this right. He put it beyond her power to acquire it, still leaving the mortgage a burthen upon the estate in her hands. Can he insist upon the burthen and at the same time deprive her of any material benefit or advantage incident to her obligation to discharge that burthen? We think not. She stands in the relation of a surety for Jarman, and any agreement between Joseph Davis and him, which operated to diminish her security or to increase her liability, was a release of all obligation on her part. The right of insisting upon the personal liability of Jarman, was one of the safeguards of the plaintiff's title, and, by voluntarily depriving her of that, Joseph Davis deprived himself of the right of insisting upon the liens of his mortgages upon the lands owned by her. She is accordingly entitled to have them discharged.

It is objected that the plaintiff lost nothing by the release, because she has the same remedy over against Jarman upon the covenants of his deeds to her and to her husband. This is not so, or at least it is very doubtful. On the covenant of warranty, the measure of damages is the consideration money and interest. In an action for the breach of the covenant against incumbrances, it has been held that the true measure of damages is the amount paid to remove the incumbrance, with interest, provided the same does not exceed the consideration money and interest. Dimmick v. Lockwood, 10 Wend., 142; Foote v. Burnet, 10 Ohio, 334. In this case, the sums due upon the mortgages greatly exceed the price or value of the lands owned by the plaintiff, and she might be obliged to pay much more than the consideration money and interest in order to remove the incumbrances.

It is furthermore objected that in place of the personal liability of Jarman, the plaintiff has that of Edward Davis, who took title to his part of the mortgaged premises subject to the mortgages and covenanting to pay and satisfy them. It seems almost needless for us to observe that the substitution of the personal liability of Edward Davis for that of Jarman, though good as between Jarman and Joseph Davis, is not obligatory upon the plaintiff without his consent, of which there is not the slightest evidence.

Again it is objected that the agreement to release Jarman is void because it was not reduced to writing and signed, and because it was without consideration. Neither of these objections is well taken. The agreement, having been fully performed by Jarman according to its terms, by the conveyance to Edward Davis and his acceptance of the grant, is binding upon Joseph Davis, although resting in parol. Joseph Davis is as much bound to the performance as he would have been if the conveyance had been made to

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himself, or as he would have been to pay Jarman a sum of money agreed upon as a consideration for the conveyance. It is in effect, the same as if the conveyance had been made to himself, and hence there is no want of consideration. The agreement being fully executed by Jarman, Joseph Davis cannot accept and enjoy the benefit of it, either by himself or his brother Edward, and at the same time, repudiate the obligation to perform on his own part. Any loss by the promisee, as well as any gain by the promisor, constitutes a valid consideration for a promise.

By the Court.—The judgment is reversed, and the cause remanded with directions to enter judgment for the plaintiff in accordance with this opinion.[11]

WELCH v. BEERS.

SUPREME COURT OF MASSACHUSETTS, 1864.
8 Allen (Mass.) 151.

Bill in equity to redeem land from a mortgage. Upon agreed facts, which are sufficiently stated in the opinion, the bill was dismissed, and the plaintiff appealed to the whole court.

HOAR, J. This case differs in only one respect from that of Bradley v. George, 2 Allen, 392; and this is rather a difference in form than in principle. The defendant Mrs. Prescott holds a mortgage of $500 upon the whole tract of land, and has taken possession for the purpose of foreclosure. Subsequently to the making of that mortgage, the mortgagor conveyed a part of the land, with the agreement recited in the deed of conveyance that the grantee should, as a part of the consideration, assume and pay the whole mortgage. Afterward the mortgagor conveyed the remainder of the land to the plaintiff in fee, not covenanting against the mortgage, but with an express understanding that the mortgage was to be paid in full by the previous purchaser. Mrs. Prescott has now become the mortgagee of the first part, by a new mortgage for $1,200; and it is conceded by the counsel, though not expressly found in the statement of facts, that the value of that part is much more than sufficient to pay the $500 mortgage.

In Bradley v. George, the first conveyance of a part of the land by the mortgagor, after the mortgage of the whole, was by a deed of warranty; and the mortgagee of the whole afterward took another

[11] See also, Metz v. Todd, 36 Mich. 473; Case v. O'Brien, 66 Mich. 289; Dedrick v. Den Bleyker, 85 Mich. 475; Barnes v. Mott, 64 N. Y. 397.
As to the right of a junior mortgagee to pay off a senior encumbrance and be subrogated thereto, see Chap. IV.

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mortgage of the remaining part. It was held that the deed of warranty exempted the land described in it from contribution to payment of the mortgage, as between the mortgagor and his grantee; and that neither the mortgagor himself, nor any person claiming title under him to the remaining part of the land, with notice, could claim such contribution. The right of the mortgagee, as such, to enforce the security against the whole mortgaged premises was not questioned. But if the mortgagee became also owner of the equity of redemption of that part of the land which, as between the mortgagor and his grantees, was chargeable with the whole amount of the mortgage, then in this latter capacity equity would require him to make the exemption of the other effectual, if it could be made so consistently with the full satisfaction of his mortgage.

In the case at bar, the exemption of the plaintiff's part of the land from contribution does not arise from a deed of warranty to him, leaving the whole burden to rest on the other part, but from an express annexation of the whole to the other part by contract, before the plaintiff purchased. Mrs. Prescott took a mortgage of the equity of redemption of the part to which the payment of the whole original mortgage belonged, with full notice of the arrangement; and the reason on which the decision in Bradley v. George is founded would therefore seem to be fully applicable. The deed of warranty of a part does not of itself directly create a lien on the remainder for the amount of the mortgage; but equity recognizes the contract of the mortgagor as binding upon any subsequent purchaser who acquires a title with knowledge of his grantor's agreement. See George v. Kent, 7 Allen, 16.

The general doctrine is established in Chase v. Woodbury, 6 Cush. 143, and has been recently fully considered, with an examination of many of the authorities, by the Supreme Court of New Hampshire, in the case of Brown v. Simons, 44 N. H. 475.

Decree according to the prayer of the bill.[12]

[12] Compare Calvo v. Davies, supra; also, Skinner v. Harker, 23 Colo. 333; Caruthers v. Hall, 10 Mich. 40; Judson v. Dada, 79 N. Y. 373.

In Mason v. Payne, Walker (Mich.) 459, it was held that a conveyance of a part of the mortgaged land, "subject to the payment of the whole" mortgage, made the part conveyed the primary fund for the payment of the mortgage.

In Engle v. Haines, 5 N. J. Eq. 186, 632, it was held that where a part of the mortgaged land was sold with an assumption by the purchaser of $500 of the mortgage, the parcel sold was the primary fund for the payment of that amount of the mortgage. See also, McCullum v. Turpie, 32 Ind. 146.

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CARPENTER v. KOONS.

SUPREME COURT OF PENNSYLVANIA, 1852.
20 Pa. St. 222.

This was an action of assumpsit for contribution, brought by C. S. Carpenter, executor of the will of Powell Carpenter, deceased, v. Isaac Koons.

In 1829, Isaac Koons, the defendant, and R. A. Parrish, were tenants in common of a large lot of ground on Willow and Fifth streets, Philadelphia. On the 27th February, 1829, they mortgaged the same to the contributors to the Pennsylvania Hospital, to secure $8,000. On 30th June, 1830, they divided the ground and executed a release to each other; Koons releasing to Parrish lots No. 1 and 2, and Parrish releasing to Koons lot No. 3, the largest of the three lots. On 1st July, 1830, an agreement was executed by Isaac Koons, by which he acknowledged that as between Parrish and himself, he was responsible for $5,000 of the mortgage, and R. A. Parrish for $3,000, from the 1st day of March, 1830.

Subsequently, Parrish became embarrassed, and under a judgment obtained against him alone on 24th June, 1843, lot No. 2 was sold by the sheriff in 1844, and was purchased by Isaac Koons, the defendant in this suit, for $975, the sale being, by the Act of 1830, subject to the mortgage. There was, however, no such condition expressed in the levy, sale, or deed. The sheriff's deed to him was dated 22d June, 1844.

Another judgment had been obtained against Parrish on 25th February, 1843, under which lot No. 1 was sold at sheriff's sale in 1846, and was purchased by Powell Carpenter for $1,050, the sale, by the Act of 1830, being also subject to the said mortgage. The sheriff's deed was dated 21st November, 1846.

On the 16th October, 1843, William Overington procured an assignment of the mortgage, and on 21st March, 1847, he obtained judgment on it against Koons and Parrish, Carpenter appearing as terre tenant. By virtue of an alias lev. fa. lot No. 1 was, on 1st November, 1847, again sold, and it was again purchased by Powell Carpenter for $4,400; and lot No. 2 was afterwards sold under the same writ, at the same sale, for $5,025, to Isaac Koons, who paid to the sheriff $500 and afterwards transferred his bid to Overington, the assignee of the mortgage. The lot No. 3 was not sold.

The executor of Powell Carpenter, the purchaser of lot No. 1, which had been thus last sold under the judgment against Parrish, brought this suit to recover from Koons, such part of the five-eighths of the mortgage debt as Koons was relieved from paying by reason of the sales and distribution of the fund.

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The case was tried before Stroud, J., who charged as was assigned for error; and verdict was rendered for the plaintiff for $720.22.

It was assigned for error, 1. That the judge charged the jury that "where several pieces of ground are subject to a joint mortgage, and a sale of one of such pieces be made; as between the purchasers of such piece and those remaining unsold, the whole encumbrance is to be thrown on the latter." Whereas he should have charged that such is the rule only where such first purchaser buys for full value.

BLACK, C. J. In Nailer v. Stanley, 10 Ser. & R. 450, it was decided that, where mortgaged land was sold in pieces and at different times, the several pieces were liable for the mortgage debt in the inverse order of their alienation. This was supposd to be overruled in the Presbyterian Corporation v. Wallace, 3 Rawle 109. But Cowden's Appeal, 1 Barr 297, and several cases since, have settled it so firmly that all attempts to shake it must be vain.

We are now to determine whether the same rule applies when the sales of the several parcels of the mortgaged premises are made, not by the mortgagor himself, but by the sheriff under a junior judgment.

A man who purchases part of a tract covered by a mortgage, buying the title out and out, clear of encumbrances, and paying a full price for it, has a plain right to insist that his vendor shall allow the remainder of the mortgaged premises to be taken in satisfaction of the mortgage debt before the part sold is resorted to. This being the right of the vendee against the mortgagor himself, the latter cannot put the former in a worse condition by selling the remainder of the land to another person. The second purchaser sits in the seat of his grantor, and must pay the whole value of what he bought towards the extinguishment of the mortgage, before he can call on the first purchaser to pay anything. The first sale having thrown the whole burden on the part reserved, it cannot be thrown back again by the second sale. In other words the second purchaser takes the land he buys subject to all the liabilities under which the grantor held it.

But if the rule is to cease when the reason of it ceases, it cannot extend to a case where the first sale was made subject to a mortgage; and that is the condition of the present one. The defendant's deed is older than his adversary's, but it conveys him nothing but the equity of redemption. The act of 1830 provides that if the oldest lien be a mortgage, and the land be sold on a judgment, the sheriff's vendee shall take it subject to the mortgage. When the defendant made his purchase therefore, he had manifestly no claim either on the mortgagor or on anybody else to pay off the whole mortgage and relieve him entirely from what was probably the most burdensome

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part of his contract. His share of the mortgage formed a part of the price he agreed to pay for the land. The statute of 1830 entered into and made one of the elements of his contract.

There is a wide and palpable difference between one who buys land subject to a mortgage, and has a reduction in the price equal to the amount of the lien, and another who pays its full value and stipulates for a title clear of encumbrances. Such a distinction is anything in the world but a "theoretical subtlety."

A plausible argument might be made in favor of the doctrine opposite to that on which this cause was ruled below. There might be specious reasons given in support of a rule which would make different parts of the mortgaged land liable in the direct order of their alienation, and compel him who first bought subject to the mortgage to pay it all or let his land go in satisfaction of it. But this has not been contended for, nor do we conceive that the law is so. Two purchasers at a sheriff's sale, subject to a mortgage which is a common encumbrance on the land of both, stand on a level. Neither of them has done or suffered anything which entitles him to a preference over the other. Equality is equity. They must pay the mortgage in proportion to the value of their respective lots.

The value of the lots is to be ascertained and determined by the jury on all the legal evidence which the parties see fit to produce. We do not think the biddings at the sheriff's sale amount to more than a circumstance from which the jury might make their own inference.

Judgment reversed and venire de novo awarded.[13]

IGLEHART v. CRANE & WESSON.

SUPREME COURT OF ILLINOIS, 1866.
42 Ill. 261.

Mr. Justice LAWRENCE delivered the opinion of the Court:

On the 8th day of January, 1853, the appellees, Crane & Wesson, resident in Detroit, sold and conveyed to Nicholas P. Iglehart, of Chicago, blocks 27 and 28 in the southeast quarter of section 17, township 39, range 4, in said city. Iglehart paid $500 in hand and, for the balance, $24,500, executed to the vendors his bond, secured by a mortgage upon the premises. The deed and mortgage were duly recorded. The bond called for payment in certain sums quar-

[13] Compare Murray v. Marshall, supra; also Briscoe v. Power, 47 Ill. 447; Erlinger v. Boul, 7 Ill. App. 40; Burger v. Greif, 55 Md. 518; Hall v. Morgan, 79 Mo. 47; Hoy v. Bramhall, 19 N. J. Eq. 563; Woods v. Spalding, 45 Barb. (N. Y.) 602. See also Zabriskie v. Salter, 80 N. Y. 555.

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terly, the last payment maturing June 1, 1861, and also for the payment every three months of all moneys received by Iglehart upon the sale of lots, to be applied as a credit upon the installment next falling due upon said land. At the same time Crane & Wesson executed an instrument by which they agreed to discharge from the mortgage "any lots fronting upon Hoosier avenue on payment of $200 each, not less than five lots at a time, and any lots on Hoosier avenue at $350 each, not less than three at a time." This agreement was not recorded untily February 14, 1859.

On the 29th of November, 1853, Iglehart subdivided the blocks into 151 lots and commenced their sale. In May, 1857, Crane & Wesson, having received the amount then due upon the land, released thirty-two lots from the mortgage. Other lots were released from time to time until October, 1859, when the last releases were executed. Fifty-seven of the lots sold were thus released. At the October Term, 1861, of the Superior Court of Chicago, Crane & Wesson, to whom a large balance was due upon the bond, filed their bill to foreclose the mortgage upon the unreleased lots, making the several purchasers parties. The cause came on to a hearing upon bill, answers, replications and proofs, and the court pronounced a decree for the unpaid purchase money and distributed the payment among all the unreleased lots. The master, to whom the case had been referred, reported that the amount already received on the released lots was sufficient to cover their equitable portion of the mortgage debt, on the principle of equality of burden among all the lots, and the decree was framed upon this principle. The defendants who were interested in lots 83, 84, 89, 116, 117, 118, 149, and 150, appealed from the decree so far as it related to those lots, and have brought the record to this court.

These lots were sold and conveyed by Iglehart, in 1855, long prior to the execution of the releases by Crane & Wesson, and long prior to the registry of the agreement above referred to, given by them to Iglehart, of which agreement it does not appear the purchasers of these lots had notice. A part of the lots released were not sold until after the sale of the lots as to which the appeal was taken. Whether they were all sold after these lots, or how many of them, is not necessary to be determined for the purposes of this opinion.

It is contended by the appellants, that, when a mortgagor makes successive sales of distinct parcels of the mortgaged property, to different persons having notice of the prior sales, and the mortgagee afterward files a bill to foreclose, the different parcels are to be subjected to the payment of the mortgage in the inverse order of their alienation. It is further contended, as a consequence of the foregoing principle, that, if the mortgagee, with actual knowledge of all the facts, releases a part of the property thus conveyed, he thereby discharges his lien pro tanto, and to the extent of the value

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of the part released, upon those parcels held under prior conveyances from the mortgagor. It is further urged, that the court below erred in subjecting the lots of the appellants to the payment of the mortgage upon the principle of equality of burden among all the lots, and in disregard of the foregoing rules. On the other hand, it is insisted by the appellees that this rule, as to the inverse order of alienation, is not so firmly established in chancery practice as to be obligatory upon the court by force of precedent, and that upon its own merits it ought not to be adopted. It is further urged, that, if it be recognized as the rule, it ought not to be applied to the case at bar.

The counsel for the appellees has presented his views with much force, but we cannot concur in them.

This question was incidentally before the court in the case of McLaurie v. Thomas, January Term, 1866 (reported in 39 Ill. 291), but was not definitely decided. We have now given it a full examination, and, although the courts in Kentucky and Iowa have declined to adopt the principle contended for by appellants, yet we find the large current of authorities, both in Great Britain and in this country, so decidedly in its favor, and the rule itself rests upon such grounds of equity and reason, that we cannot refuse to accept it as the law. It rests, indeed, upon a simple principle. If a mortgagor conveys a portion of the mortgaged premises, retaining a portion himself, it is familiar law and admitted by all the cases, that, as between the mortgagor and his grantee, that portion retained by the mortgagor should be first applied to the payment of the mortgage. An equitable lien attaches for this purpose in favor of the grantee, as against the parcel held by the mortgagor. The equity of this rule is apparent, on the plain ground that a man's own property should be first applied to the payment of his own debts, and when a court of chancery requires a mortgagee first to exhaust that part of the mortgaged property still held by the mortgagor, it is only another application of the principle so long and so firmly settled by courts of equity, that, where there are two creditors standing in equal equity, one of whom has security upon two funds and the other upon only one of the two, the former is required to proceed primarily against the fund upon which the latter has no claim.

The justice of first subjecting to the payment of the mortgage so much of the mortgaged property as may still remain in the hands of the mortgagor, cannot be denied, and is admitted by the counsel for the appellees. If, then, this species of equitable lien has attached in favor of a purchaser of a part of the mortgaged premises against the residue in the hands of the mortgagor, how is this residue to be considered as discharged from the lien, merely by a sale and conveyance of it to a third person taking with notice of all the facts? The purchaser with notice simply steps into the shoes

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of the mortgagor. He can claim no equity which would displace that of the prior grantee of the other portion of the mortgaged premises, because, having voluntarily and knowingly become the purchaser, he cannot, by such act, and at his own mere volition, displace or impair the equity of another.

This is the ground upon which rests the rule that mortgaged premises are to be subjected to the lien in the inverse order of their alienation, where the subsequent purchasers have bought with notice, and, as already remarked, in our opinon, the rule has a most persuasive equity.

* * * * * * *

The only States in which this doctrine is distinctly repudiated, so far as we are aware, and the principle of equality of contribution among all the purchasers of the mortgaged premises applied, are Kentucky, in Dickey v. Thompson, 8 B. Mon. 312, and Iowa, in Bates v. Ruddick, 2 Clarke, 423.[14] We do not deem the reasoning in those cases satisfactory, and their authority must yield to that of the many courts that have laid down a different rule.

From this rule, as to the order in which mortgaged premises are to be charged, it follows as a corollary, that, if the mortgagee, with actual notice of the facts, releases from the mortgage that portion of the premises primarily liable, he thereby releases pro tanto, the portion secondarily liable. When the mortgage is sought to be enforced against the owner of the latter, he can claim an abatement of his liability to the extent of the value of that portion which should have made the primary fund. But the notice to the mortgagee must be actual and not constructive. It would be unreasonable to require a mortgagee to take notice of the registry of deeds made subsequent to his own mortgage. He is neither a "creditor" nor a "subsequent purchaser," and therefore falls neither within the letter nor spirit of the recording laws. See Mattison v. Thomas, decided at the present term of the court (reported in 41 Ill. 110) and cases there cited. See also Washburne on Real Property, 572; Patty v. Pease, 8 Paige, 277; Taylor, Exr., v. Morris, 5 Rawle, 51; Cheesebrough v. Millard, 1 Johns. Ch. 409; Stuyvesant v. Hone, 1 Sand. Ch. 419; James v. Brown, 11 Mich. 26; George v. Wood, 9 Allen, 80; Stuyvesant v. Hall, 2 Barb. Ch. 151. It is easy for the first purchaser from the mortgagor to give notice to the mortgagee, but to require of the latter an examination of the registry for subsequent conveyances which cannot impair his lien, and in which he has no direct interest, would be imposing upon him a burden that does not belong to his position. All the authorities agree, that this doctrine of inverse order is to be so applied by the courts as not

[14] The cases referred to concede that any part of the mortgaged land which is retained by the mortgagor is primarily liable, but hold that, as between several purchasers, the burden should be born ratably.

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to impair the security of the mortgagee. But, when the mortgagee, having actual notice, releases the part primarily liable, the act draws after it the consequences above stated. This has been often decided. Skeel v. Spraker, 8 Paige, 195; Patty v. Pease, *id.* 277; Brown v. Simons, 44 N. H. 475; Stuyvesant v. Hall, 2 Barb. Ch. 151; Lyman v. Lyman, 32 Vt. 79; Chase v. Woodbury, 6 Cush. 143; Carter v. Neal, 24 Georgia, 346; Shannon v. Marselis, 1 Saxton (N. J.) 413.

But, while the mortgagee must have actual notice in order to affect his rights, a second or subsequent purchaser from the mortgagor is bound by the constructive notice furnished by the registry of prior conveyances of any portion of the mortgaged premises.

When the first grantee from the mortgagor has duly recorded his conveyance he has done all in his power. Not knowing who may be future purchasers of other portions of the premises, he cannot give them actual notice. The Supreme Court of New Hampshire in Brown v. Simons, 44 N. H. 475, speaking of the subsequent purchaser, say: "in the examination of the title to the part he proposes to buy, he is led directly to the original mortgage, and he finds that his is but part of an entire tract in which his grantor has only a right of redemption, and which was originally subject to a common burden, but liable to be affected by a prior sale of another part of the entire tract. Under such circumstances the different parcels of the tract mortgaged cannot be considered as separate and distinct, so as to relieve him of the duty of inquiring into the title to the other part; but, we think, that, in examining the title to the part he proposes to buy, he is led directly to a deed that puts him on inquiry as to the remaining part of the land." In support of these views the court refer to 2 Fonbl. Eq. b. 3, ch. 3, section 1, note; 4 Greenl. (Cruise) 452, note; Parkert v. Alexander, 1 Johns. Ch. 398; Chase v. Woodbury, 6 Cush. 113; La Farge Fire Ins. Co. v. Bell, 22 Barb. 54; Montgomery v. Dorion, 6 N. H. 255; French v. Gray, 2 Conn. 108.

We concur in the views expressed by the Supreme Court of New Hampshire.

It remains to be considered whether the case at bar falls within the principles above stated.

It is urged by the counsel for the appellees, that they had no actual notice of the prior conveyances when they executed the releases. There is, it is true, no direct and positive proof, but the inference of notice, from the correspondence introduced in evidence, and from other circumstances proven, is irresistible. The land was sold in June, 1853, and the arrangement between the parties at that time was, that it was to be subdivided into not less than one hundred and fifty lots for the purpose of sale to various purchasers. Iglehart was to pay twenty-five thousand dollars. He paid only five hundred in hand, giving bond and mortgage for twenty-four thousand

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five hundred. It is evident, from the character of this contract, that the vendors relied for payment on the proceeds of the sale of the lots, and accordingly they inserted in the bond a provision, not only for the payment of the balance in stipulated sums quarterly, but also that Iglehart was to pay over quarterly all the moneys he had received on sales of lots. The peculiar character of this contract thus furnished the strongest inducement to the vendors to keep themselves fully informed of the sales made by Iglehart. The first release was executed May 18, 1857, and, prior to that time, a large number, we believe more than half, of the lots had been sold. We find, in the correspondence prior to that date, numerous letters from Crane & Wesson to Iglehart (those from Iglehart to Crane & Wesson, it should be observed, are not in the record) pressing for payment, stating their need of money, and giving reasons why they should not send releases asked for by Iglehart. There is a large mass of this correspondence, and it shows, on the part of Crane & Wesson, who were themselves professional dealers in real estate, a perfect knowledge of their business with Iglehart. But these letters furnish only a part of the proof. It appears by the testimony of several witnesses, who were clerks in the office of Iglehart, that one of the firm of Crane & Wesson was in Chicago two or three times every year, and that, when at the office of Iglehart, he would examine the books relating to this transaction, one of which was a volume having these lots numerically arranged, and showing what sales had been made and the condition of each lot.

Now it is not conceivable that an intelligent business man, himself a real estate dealer, and having a contract of this peculiar kind with another real estate dealer, by the terms of which both his security, and the amount due, would depend largely on the disposition that had been made of the different lots, needing money, pressing for payment, and not very well satisfied with the doings of his vendee, and actually examining from time to time a book containing a plain statement of the sales, or at least taking the books and going with his vendee into an inner room, as appears by the testimony—it is not conceivable, we say, that he should not have ascertained how the business was progressing, and what lots were sold. Moreover, the first release was for thirty-two lots which were sold in a body when the release was executed, and Crane came on from Detroit, and participated personally in the transaction. The lots in controversy had then been sold for more than two years, and a large number of all the lots had been sold at that time. The complainants knew this fact, and, although Crane, when he delivered this release in Chicago, may not have been able to give from memory the number of each lot sold, and the name of the purchaser, yet these facts must have been brought to his knowledge before this time, and he knew that all the details of the business were at hand in the books of Iglehart,

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which he often examined. We are obliged to consider the complainants as chargeable with notice.

It is also urged by counsel for appellees, that the appellants should have filed a cross-bill. If the complainants had executed no releases, and the appellants had sought merely to procure a decree directing the lots last conveyed to be first sold, it would doubtless have been necessary to file a cross-bill, making their co-defendants parties, as they would have been asking a decree to the prejudice of their co-defendants. But, for the mere purpose of setting up against the complainants a release executed by them, as a ground for holding the mortgage, to a certain extent, discharged, we see no reason for filing a cross-bill.

It is further urged, that the special agreement to release each lot whenever a certain amount should be paid upon it, must be considered as withdrawing this case from the ordinary rule. But that agreement was not recorded until February 14, 1859, and there is no pretense that it was known to the purchasers of the lots in controversy. Their equity, therefore, attached as if no such agreement were in existence.

The decree, so far as it relates to these appellants, is reversed, and the cause is remanded for further proceedings in conformity with this opinion. Before a decree can be pronounced against the lots of appellants, the value of the lots released, at the time of such release over and above the amount paid on them, must be ascertained and allowed as a credit on the mortgage.

Decree reversed.[15]

GRAY v. LOUD & SONS LUMBER COMPANY.

SUPREME COURT OF MICHIGAN, 1901.
128 Mich. 427.

Bill by Emma R. Gray against the H. M. Loud & Sons Lumber Co. impleaded with Anthony Muer, to set aside a foreclosure sale.

MOORE, J. On the 22d day of October, 1887, complainant purchased from Hibbard Baker, by land contract, lot No. 162 of the Waterworks subdivision of private claim 257, in the township of Hamtramck, county of Wayne, for a consideraion of $500. Fifty dollars of the purchase price was paid at the date of the contract, $50 and interest November 25, 1887, $300 and interest during the year 1888, $50 February 1, 1890, and the final payment of $50 and interest April 1, 1890. Complainant did not record her contract. The lot was a vacant, unimproved one. Complainant received a

[15] Compare Coyle v. Davis and Murray v. Marshall, supra.

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warranty deed of the lot from Hibbard Baker and wife, in pursuance of said contract, on the 22d day of September, 1890, and two days later recorded it.

On May 3, 1887, Hibbard Baker and Howard G. Meredith, executed to the State Savings Bank a mortgage on 45 lots of the Waterworks subdivision for a consideration of $5,000, which mortgage contained the following clause: "With the privilege of having any lot released at any time on payment of $300 and accrued interest, with three months' extra interest." This mortgage included lots 162, 251, 252, and 253. Releases were executed by the State Savings Bank at various times, releasing all the lots from this mortgage, except the four lots mentioned.

On the 28th day of February, 1889, Hibbard Baker and Howard G. Meredith executed to Caroline E. Richards a warranty deed for lots 251, 252, and 253. On the 18th of March, 1889, Caroline E. Richards deeded said lots to Gustave E. Mann, and on January 31, 1890, he deeded them to the H. M. Loud & Sons Lumber Company, which deed was recorded on the 15th of March, 1892.

On the 12th day of April, 1895, after all the lots subject to the mortgage had been discharged therefrom except lots 162, 251, 252, and 253, the State Savings Bank assigned the mortgage to the H. M. Loud & Sons Lumber Company for $472.42. Immediately on obtaining the assignment of this mortgage, the H. M. Loud & Sons Lumber Company commenced foreclosure proceedings against all of these lots, and on the 12th day of August, 1895, lot 162 was bid off to the H. M. Loud & Sons Lumber Company for $520.49, being the entire amount claimed to be due on said mortgage, together with the costs and expenses of foreclosure and sale. On the 13th of October, 1899, the H. M. Loud & Sons Lumber Company sold and deeded lot 162 to Anthony Muer for the sum of $750. The defendant the H. M. Loud & Sons Lumber Company had no knowledge of the existence of this mortgage to the State Savings Bank until some time after it purchased, in 1892. The complainant had no knowledge of the existence of this mortgage until the 3d day of February, 1896, and she paid all the taxes on this property from the time she purchased it until November, 1895.

November 24, 1899, complainant filed this bill, asking: (1) That the purchase of the mortgage by the Louds from the bank be decreed to be a full payment and satisfaction thereof as against Gray; (2) that the foreclosure and sale of lot 162 by the Louds may be declared null and void against Gray, and that the Louds may be decreed to release to Gray all their title and interest in and to lot 162 under and by virtue of the mortgage and foreclosure thereof; (3) for general relief. The court made a decree that neither party was entitled to have the other's land sold prior to its own, but that the balance due on the mortgage, and expenses, amounting to $520.49,

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should be paid ratably by each of the four lots. The court also held that, as the defendant had sold lot 162 to a bona fide purchaser for $750, that amount was a fair valuation of the lot, and that the defendant should account to the complainant for that sum, less $130.12; and a decree was entered requiring the defendant to pay to the complainant the sum of $619.88, that being the difference between the amount for which the lot was sold and one-quarter of the mortgage and expenses. Both parties appealed from this decree, though complainant does not object to having it affirmed.

It is a claim of the complainant that, having purchased, and substantially paid for, her lot before the other lots were sold to defendant's grantor, although her conveyance was recorded subsequent to the record of the first conveyance of the other lots, she was entitled to have those lots sold first for the satisfaction of the mortgage; citing Cooper v. Bigly, 13 Mich. 463; James v. Hubbard, 1 Paige, 228; Ellison v. Pecare, 29 Barb. 333; Libby v. Tufts, 121 N. Y. 172. In Libby v. Tufts, though the second purchaser put his conveyance on record first, the first purchaser had fully completed his contract, and entered into possession of the premises. A reference to the other cases will show they, too, are not controlling in this one.

Complainant insists that, even though she may not insist upon the lots being sold in the inverse order of alienation, the decision of the circuit judge is undoubtedly in accordance with the law applicable to all cases where it would be inequitable to apply the general rule, and is as favorable to the defendant as the circumstances warrant; citing Cooper v. Bigly, 13 Mich. 463; Bernhardt v. Lymburner, 85 N. Y. 172; Woods v. Spalding, 45 Barb. 602; Hill's Admr's v. McCarter, 27 N. J. Eq. 41. In Hill's Adm'rs v. McCarter the first purchaser took his deed subject to the mortgage, and the court very properly held his land was not wholly relieved from the lien. An inspection of the other cases cited will show they are not decisive of this case in favor of complainant.

If Miss Gray's contract had been put upon record, or if she had gone into possession of her lot, and her possession had been so obvious that it would have been notice to subsequent purchasers, her contention that the lots purchased by the defendant must first be sold would be sustained by the great weight of authority. As she did not put her contract upon record, and her lot was a vacant, unoccupied lot, can the decree of the circuit judge be sustained? When Miss Gray obtained her land contract, and made payments thereon, she obtained an interest in the land described therein. Balen v. Mercier, 75 Mich. 47. Section 8988, 3 Comp. Laws, reads:

"Every conveyance of real estate within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valu-

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able consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded."

Sections 9035-9038, 3 Comp. Laws, provide for the recording of land contracts.

The object of the recording laws is to protect subsequent bona fide purchasers (Godfroy v. Disbrow, Walk. Ch. 260), and to prevent fraud by securing certainty and publicity in such dealings (Atwood v. Bearss, 47 Mich. 72). In Burns v. Berry, 42 Mich., at page 179, in commenting on the policy of the recording acts, the court says:

"The protection which this statute gives to a bona fide purchaser does not proceed upon the theory, and is not made to depend upon the fact, that the grantor, at the time of such conveyance, had any interest in the premises whatever, or that any passed from him by his conveyance to such subsequent purchaser. It is not by force of the conveyance, but by the terms of the statute, that such subsequent purchaser acquires title to the premises. His grantor, having previously conveyed, has no title left to convey, and could therefore by his deed, unaided by the statute, pass none to any third person. Our registry laws, however, step in, and, for the purpose of protcting an innocent purchaser, give him what he supposed, and from an examination of the records had a right to suppose, he was acquiring by his purchase, and to this extent cut off the previous purchaser who negligently failed to record his conveyance."

* * * * * * *

Brown v. Simons is [44 N. H. 475] an instructive case, not only because it is quoted with approval by Justice Campbell [in Cooper v. Bigly], but also because it comments upon and disapproves Ellison v. Pecare, which is relied upon by the complainant. We quote:

"If, however, at the time of the subsequent conveyance by the mortgagor, the grantee has no notice of the prior conveyance, in fact or constructively (the same not having been registered), such subsequent grantee ought not to take the land so granted subject primarily to the whole debt. On the contrary, as the prior grantee has failed to record his deed, and thus give notice of the true state of the title, the subsequent grantee, unless otherwise notified, may rightfully regard the land which is thus apparently in the hands of the mortgagor as primarily liable for the whole debt. It is true that the first grant by the mortgagor of a part of the property does not in terms impose a lien upon what is left, but in effect it creates upon it, as between the parties, a new incumbrance, and makes it liable primarily for the whole debt, as much as if such mortgagor had mortgaged it to such purchaser to indemnify him against the original mortgage. It makes a case, then, that clearly comes within the spirit of our statute of enrollments, which is designed for the security of subsequent purchasers and creditors, to give notice of

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all conveyances of any estate in lands, whether legal or equitable. 1 Story, Eq. Jur. par. 403; Parkist v. Alexander, 1 Johns. Ch. 398; 4 Greenl. Cruise, 448, 452, and notes; General Ins. Co. v. United States Ins. Co., 10 Md. 517; Brush v. Ware, 15 Pet. 113.

* * * * * * *

"In accordance with these views is the doctrine of Chase v. Woodbury, 6 Cush. 143, where a mortgagor conveyed the whole of the mortgaged property to S .and R., to each an undivided half, and S., having recorded his deed, conveyed his half to C. before the deed to R. was registered; and, upon the payment by the representative of R. of the whole mortgage debt, it was held that he could not require contribution of C., because C. had purchased without any notice of the sale to R., and might, therefore, rely upon the other half being first held for the whole debt, although had the deed to R. been recorded, it would have been notice of a lien on the land sold to S. equally with the other; but the failure to record it was a failure of one claiming an incumbrance, namely, a lien on the estate for a contribution for one-half the money he might pay to redeem it, and this, the court held stood upon the same footing as if R. had a mortgage from the first grantor, which he had failed to record. The result of this case is that a party purchasing a part of an estate under mortgage would be charged with notice of a registered conveyance of another part, when the effect would be to render his part so purchased liable to contribution equally with the other; and for the same reason he would be charged with such notice in a case where the effect would be to make his purchase primarily liable for the whole debt. The case of Chase v. Woodbury is directly in point, and fully sustains the views we have expressed.

"It is true it has been suggested that this right to have first applied the lands remaining in the mortgagor's hands, and those last sold, is a mere equity, and not a lien or incumbrance that comes within the provisions of the register laws, and so it is directly held in Ellison v. Pecare, 29 Barb. 333; and therefore it was decided that the deed first delivered would take precedence over a subsequent deed of another parcel, although the latter was first recorded. In this case, however, it appeared that neither of these purchasers had knowledge of the original mortgage at the time of their purchase, and the court expressly declined to give an opinion as to the result had the second purchaser known of the existence of the mortgage, and had he examined the records, and, finding no previous conveyance, been induced to buy, supposing in good faith that he was the first purchaser, in which case it is said there would be some show of equity in favor of the second purchaser. In the case of LaFarge Fire Ins. Co. v. Bell, 22 Barb. 54, it was held, upon much consideration, that the register act, which provides that 'Every conveyance not recorded shall be void against a subsequent pur-

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chaser in good faith of the same real estate, or any portion thereof, whose conveyance shall first be duly recorded,' does apply to the equitable right which is acquired by a purchaser of a parcel of the mortgaged property to have the residue first applied to the payment of the mortgage debt, and that such equitable right will not be defeated by a prior conveyance of that residue, unless it be by deed duly recorded, or other notice at the time of his purchase; and the reasons assigned for this doctrine are in no degree shaken by the subsequent case of Ellison v. Pecare, which appears to have been decided without an examination of the case of La Farge Fire Ins. Co. v. Bell. Indeed, it is difficult to see how any other result can be reached. The deed of a parcel of the tract mortgaged carries with it a well-established right to require the mortgagee first to exhaust the residue in the hands of the mortgagor before applying the parcel so conveyed; and, whether this right can be enforced only in equity or not, it is clearly a substantial interest in such residue, and one which it is the policy of the registry laws to protect. See Montgomery v. Dorion, 6 N. H. 255; French v. Gray, 2 Conn. 108; 4 Kent. Comm. 456; Brown v. Manter, 22 N. H. 468."

See 2 Jones, Mortg. (4th Ed.) § 1620.

When the defendant's grantor purchased the three lots, the record did not disclose a sale to Miss Gray, and he had a right to assume that the mortgagee would resort to the land still standing in the name of Mr. Baker before selling the land purchased by him.

Counsel say:

"The mortgage contained the following provision: 'With the privilege of having any lot released at any time on payment of $300 and accrued interest, with three months' extra interest.' Under this clause complainant was entitled to have her lot released at any time from the mortgage on payment of $300, and her lot should not be made liable to more than that amount on foreclosure of the mortgage, and any excess over that amount would have to be borne by the other lots, in any view of the case,"—citing Clark v. Fontain, 135 Mass. 464.

It is doubtless true that complainant might have had her lot released from the mortgage by paying to the mortgagee $300, but she never sought to do so. She waited nearly four years after the mortgage foreclosure before filing this bill, and it is not a part of the theory of the bill.

It is claimed there was paid to the bank about $70 extra interest, which was usury, and which should have been applied as a general payment on the mortgage debt. It has been repeatedly held that the defense of usury is a personal one, and may be waived. Sellers v. Botsford, 11 Mich. 59; Gardner v. Matteson, 38 Mich. 200.

This case is an unfortunate one for the complainant, but it is made so by her failure to put her contract upon record.

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The decree is reversed, and the bill of complaint dismissed, with costs.

The other Justices concurred.[16]

HILES v. COULT ET AL.

COURT OF CHANCERY OF NEW JERSEY, 1878.
30 N. J. Eq. 40.

Bill to foreclose. On petition to open final decree, etc.

The Chancellor [RUNYON]. By the final decree in this cause, it is directed that a certain part of the mortgaged premises, which was conveyed by Joseph Coult and his wife to Isaac A. Walker, on the 1st of July, 1868, be sold to raise a part of the money due on the complainant's mortgage, which was, when the conveyance to Walker was made by Coult, an encumbrance on that and other land. Walker, subsequently, by two deeds, one dated January 18th, 1869, and the other dated February 4th in that year, conveyed two parcels of the property to the petitioners. On the 20th of November following, he conveyed the rest of the property to the complainant, who, on the 16th of September, 1876, conveyed it to Mary E. Schofield. The petition prays that the decree may be so amended as to direct that the property be sold to raise the before-mentioned proportion of the money due on the complainant's mortgage, with interest and costs, in inverse order of the conveyances; that is, that the part conveyed to and now held by Mary E. Schofield be sold for that purpose before the property of the petitioners. The conveyances by Walker were all by deeds of warranty, and neither the petitioner nor the complainant knew, at the time of taking the conveyances to them, of the existence of the mortgage now held by the complainant. They all, however, had constructive notice of it, it having been duly recorded.

It is the established rule of this court that, if a mortgagor sell the land covered by the mortgage in different parcels and at different times, the parcels shall be sold to raise the money to discharge the mortgage debt in the inverse order of their alienation. Shannon v. Marselis, Sax. 413. And this rule applies though the sales in parcels were made, not by the mortgagor, but by a person claiming under him. Wikoff v. Davis, 3 Gr. Ch. 224. It is applicable, also, to a case such as the present. When the petitioners bought the part of the property which was conveyed to them, it was subject to the mortgage, but the rest of the property remained in the hands of Walker, and, as between him and them, that part so retained by him was liable, in equity, to be first sold to pay the mortgage. It is to

[16] Compare Sternberger v. Hanna, 42 Ohio St. 305.

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be regarded as having been then equitably charged with the payment of the mortgage debt, and the complainant, when he purchased it from Walker, took the place of the latter, and took the land so charged in equity. That land, now owned by Mary E. Schofield, must, as between her and the petitioners, be first sold to raise the proportion of the mortgage debt, interest and costs, decreed to be raised by sale of the Walker property.

RAPALLO, J., in HOPKINS v. WOLLEY, 81 N. Y. 77 (1880).

We concur with the learned judge in holding that, in the absence of any circumstance showing a contrary intent, the reconveyance by William D. Wolley to Samuel Staples of 180 acres, out of the larger tract, said to contain 361 acres, which Wolley had previously conveyed to Staples, constituted the land remaining in the hands of Wolley the primary fund for the payment of the incumbrances, subject to which the entire tract had been conveyed by Staples to Wolley. That the facts that Staples was personally liable for these incumbrances to the persons in whose favor they existed, and that Wolley was not so liable, did not affect this equity between him and Wolley and his subsequent grantees, but that as to the 180 acres Staples was entitled to the benefit of the rule that the lands should be sold in the inverse order of their alienation, to the same extent as if he had had no previous connection with the lands.[17]

CAMPBELL, J., in COOPER v. BIGLY, 13 Mich. 473 (1865). It has always been understood to be the settled law of this state that, where mortgaged premises are conveyed or incumbered in parcels, they are, upon a foreclosure, to be sold in the inverse order of such conveyances or incumbrances, unless the mortgagee will be prejudiced by having the property sold in parcels—a thing which can never happen where property, when mortgaged to him, was treated as separate. This doctrine was recognized in Mason v. Payne, Walker's Ch. R., 459, and Caruthers v. Hall, 10 Mich. R., 40, in both of which cases the principal exception to the rule was referred to and enforced. The same principle was recognized and explained in James v. Brown, 11 Mich. R., 25. It rests chiefly, perhaps, upon the grounds that where one who is bound to pay a mortgage confers upon others rights in any portion of the property, retaining other portions himself, it is unjust that they should be deprived of their rights, so long as he has property covered by the mortgage, out of which the debt can be made. In other words, his debts should be paid out of his own estate, instead of being charged on the estates of his grantees. Any other rule would be, in effect, to enable him to enjoy for his own benefit that which he has once vested in another, and,

[17] Compare Wikoff v. Davis, 3 Green Ch. (N. J.) 224.

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in a measure, to recall his own grant. The rule cannot, therefore, depend upon the existence or non-existence of covenants of warranty. It depends simply on the fact whether he has or has not seen fit, in making a disposition of a part of his incumbred premises, to charge it primarily with the payment of the incumbrance. Whenever he so charges any part, the purchaser takes it subject to the burden, and the relative date of his purchase is immaterial. See cases cited above; Welch v. Beers, 8 Allen's R., 151; Kilbourne v. Roggins, 8 Allen's R., 466. It has, indeed, in several cases cited at the bar, been held that the covenant of warranty was very important, in determining the intent of the mortgagor not to charge the mortgage on the property sold. But there is no satisfactory authority holding that, in the absence of such a warranty, no such intent could be presumed. On the contrary, wherever the doctrine of priority is respected at all, it has been enforced unless an opposite intent was made out. And such appears to us the common sense inference; for a man owing a debt, for which his own property remains liable, must naturally be supposed to expect to have it paid out of his own means, unless he has bargained to the contrary. And this equity, having arisen in favor of the first purchaser, must remain in his favor against any subsequent equities of other parties derived from his grantor.

* * * * * * *

And the question next arises, whether the conveyance to Thomas B. Bigly is to be preferred before the rights of Eldred and Vincent. That his deed is prima facie prior in equity to their claims, is plain from the considerations already referred to. But it is claimed that this deed contains a provision which postpones it. The deed contains the usual clauses of warranty; but the warranty and the covenant against incumbrance, except "a certain mortgage," the date and amount whereof, and the mortgagee's name, are left in blank. It was insisted on the argument that this exception is void for uncertainty. In the absence of proof of any mortgage but Cooper's, we are not disposed to regard it so. That is certain which can be made certain; and, until two mortgages appear, there is no ambiguity. The question, then, arises, whether, by this phraseology, the Cooper mortgage is chargeable primarily on this lot. We do not think the language leads to this conclusion. It only protects the grantor from any liability over, in case this land should become necessary and be disposed of to pay the mortgage. But it does not provide that this lot shall be charged in preference to the Fort street property, still retained by him; and we think it would be a strained construction to consider this deed as depriving the grantee of any advantage the priority of conveyance would afford him. If the Fort street lot should be insufficient, the warranty without the exception could not have saved this lot, but without the exception John

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Bigly would have been responsible on his covenants, had it been sold on the mortgage. By inserting this exception, he conveys the property subject to the risk that the remaining property yet unsold and unincumbered will not suffice to pay the debt, and no more. In other words, the deed is, so far as the Cooper mortgage goes, a mere conveyance without warranty; but it is not a conveyance upon condition, or subject to any specific duty or burden. It is quite as effectual as any deed without covenants, and in some respects more so, and the absence of covenants does not vitiate or change a title, or deprive it of priority.

It is claimed, however, that, as against Vincent and Eldred, this deed is void for want of consideration, and is designed to defraud creditors. We do not deem it necessary to examine into the proof of consideration. There is nothing before us which would show that John Bigly was not entitled to deal with the property as he pleased. It does not appear that, at that time, he owed unsecured debts, or was in embarrassed circumstances. But had he been so, it could not concern these parties. They stand on the record simply as subsequent purchasers of other property, having full record notice of this deed, and at liberty to purchase or not, as they saw fit. They have no greater rights than John Bigly would have had if he had not conveyed to Eldred, or if his equity of redemption had not been purchased by Vincent. He could not have revoked his own deed, had it been without any consideration whatever. No one can assail such a conveyance, except some creditor who has taken the requisite steps to entitle him to resort to the land in payment of a debt, as against which it can be made out to have been fraudulent; Fox v. Willis, 1 Mich. R., 321. Eldred and Vincent, so far as the present case goes, stand in John Bigly's shoes, and not in opposition to his rights, as they remained after the deed to Thomas.

We think the Fort street lot should be sold before any resort is had to the river lot.[18]

[18] Compare Carpenter v. Koons and Inglehart v. Crane & Wesson, supra. In Aiken v. Gale, 37 N. H. 501, it was held that two successive purchasers by quitclaim deed should contribute ratably. In Aderholt v. Henry, 87 Ala. 415, it was said that a warranty deed is necessary to raise the equity of exoneration. In Erlinger v. Boul, 7 Ill. App. 40, and Woods v. Spalding, 45 Barb. (N. Y.) 602, it was said that a warranty deed is not necessary. In Jackson v. Condict, 57 N. J. Eq. 522, it was held that a deed on a nominal consideration and without covenants of warranty made the grantee liable to a ratable contribution, Emery, V. C., saying, "As between different portions of the premises subject to a common charge, the general and fundamental rule of equity is, that the burden is to be borne by the different portions ratably. The exception to the operation of this fundamental rule, which is made for the purpose of marshalling the portions in favor of a prior grantee of a portion of the premises, is based not on the simple fact of the earliest grant, but upon the conclusion that the character and circumstances of

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MILLIGAN'S APPEAL.

SUPREME COURT OF PENNSYLVANIA, 1883.
104 Pa. St. 503.

Mr. Justice PAXSON delivered the opinion of the court, January 7th, 1884.

It was decided in Nailer v. Stanley, 10 S. & R. 450, that, where mortgaged land was sold in pieces and at different times, the several pieces were liable for the mortgage debt in the inverse order of their alienation. This principle was fully recognized in the later case of Cowden's Appeal, 1 Barr. 267, and has been uniformly followed since. It is now settled law. In Carpenter v. Koons, 8 Harris 222, it was held, the principle did not apply to two or more purchasers at a sheriff's sale, who had bought subject to a common incumbrance. In such instances equality is equity.

In this case, John A. Carothers purchased about fourteen acres of land of Mrs. Margaret Chalfant, and gave to her a purchase-money mortgage covering the whole, for $14,040. He then divided the property into lots for the purpose of sale, which we will designate by classes, as 1, 2 and 3. Afterwards; he mortgaged class 1 to Wm. A. Shaw, the plaintiff below; then he mortgaged class 2 to Robert E. Stewart, one of the defendants below; lastly, he conveyed class 3 to Robert Milligan in fee, and by divers subsequent conveyances, the title thereto became vested in Mary E. Milligan, another of the defendants below, and one of the appellants.

During all this time, the paramount mortgage to Mrs. Chalfant covered all the lots.

Stewart, one of said mortgagees, foreclosed his mortgage, and bought the lots embraced therein, at the sheriff's sale.

Subsequently, Carothers was adjudged a bankrupt in the United States District Court, and his title became vested in his assignee.

The latter sold the lots in class 1, in pursuance of authority derived from the court in bankruptcy, free and divested from all liens, and realized therefor the sum of $7,700. The register in bankruptcy distributed the proceeds to the Chalfant mortgage, disregarding Mr. Shaw's claim to have the proceeds applied to his mortgage, which, as before stated, covered this class of lots. As the Chalfant mortgage was the first lien, this distribution could not have been avoided. The result was, however, that Shaw found his security swept away for the benefit of the subsequent incumbrancers and purchasers of other portions of the property. He therefore filed

the earliest conveyance are such as show that it was the intention of the parties to the conveyance that the portion conveyed should be free from the common burden."

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this bill in the court below for the purpose of being substituted to the rights of the Chalfant mortgage upon classes 2 and 3. The court below so decreed, which was the occasion of this appeal.

It was contended for the appellants that the case came within the ruling referred to in Carpenter v. Koons; that the parties stood in the relation of purchasers at a sheriff's sale, where equality is the rule, and that at most it was a question of contribution, and not of subrogation.

We are unable to see the force of this position. When Shaw took his mortgage on class 1, he had an equity to compel Carothers to pay the paramount mortgage out of the remaining portions of the property not embraced in his (Shaw's) mortgage. This is too clear to need elaboration. It was not the case of a purchase subject to the Chalfant mortgage, with a portion of the purchase money withheld to meet it. No such element exists in the case. It is true, Shaw's mortgage was in point of fact subject to the paramount mortgage, but he held no funds of Carothers to meet it. On the contrary, he had the clear equity, as before stated, to compel the latter to pay it out of the remaining property. This equity Carothers could not defeat by subsequently conveying or mortgaging classes 2 and 3. Such grantees or mortgagees had record notice of Shaw's equity.[19]

I see no significance in the fact that Stewart became the purchaser at a judicial sale under his own mortgage. It did not change his position in any essential degree. He has the rights as purchaser at such sale which he previously held under the mortgage—nothing more.[20]

Without any action on the part of Mrs. Chalfant or any of the parties, the land bound by Shaw's mortgage has thus been taken to pay the paramount mortgage, which, as between the parties, Milligan's land first, and Stewart's land secondly was liable for. We do not think the cases of Lloyd v. Galbraith, 8 Casey 103; and Conser's Appeal, 11 W. N. C. 220, are in conflict with this view. As was correctly said by the learned judge below: "These cases differ from the present one in this, that the parties seeking to be subrogated to the rights of creditors who had liens on two tracts of land, did not acquire their liens until after the common debtor had

[19] See also Fassett v. Mulock, 5 Colo. 466; Boone v. Clark, 129 Ill. 466; Cooper v. Bigly, 13 Mich. 463; Stulb v. Ainslie, 14 Wash. 567; Warren v. Foreman, 19 Wis. 35.

[20] "This order of sale being established for the protection of the second mortgage, a purchaser on foreclosure of that mortgage must have a right to insist upon being protected in his purchase, inasmuch as the right in the mortgagee to have the securities marshalled would be of no value to him if it did not continue for the protection of the purchaser." Cooley, J., in Sibley v. Baker, 23 Mich. 312. Compare, Carpenter v. Koons, supra, and cases cited. See also Sternberger v. Sussman, 69 N. J. Eq. 199.

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aliened that part of the land sought to be reached. This is an essential difference."

Nor do we see any force in the objection that because the Chalfant mortgage has been paid by process of law there can be no subrogation. Actual payment discharges a judgment at law; but in equity, it may still subsist if the justice of the case requires it. And an equitable right to such judgment may exist without any actual assignment of it; Fleming v. Beaver, 2 Rawle 128; Morris v. Oakford, 9 Barr 498; McCormick's Admin. v. Irwin, 11 Casey 111.

* * * * * * *

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

BERNHARDT v. LYMBURNER.

COURT OF APPEALS OF NEW YORK, 1881.
85 N. Y. 172.

ANDREWS, J. The question in this case arises between subsequent mortgagees of different parts of the premises embraced in the plaintiff's mortgage, upon an exception of the defendant Howard, to the direction in the judgment that the part of the premises covered by his mortgage, should be first sold.

The plaintiff's mortgage is upon a lot on the west side of Main Street, in the city of Buffalo, one hundred feet front, and one hundred and thirty-two feet in depth. It was executed by Harriet C. Lymburner, the owner of the premises, September 1, 1871, and was recorded September 2, 1871, and there is due thereon $5,000, and interest from March 1, 1878. The defendants, Hamilton M. Lymburner and George C. Torrey, as executors, hold a second mortgage, dated October 1, 1872, also executed by Harriet M. Lymburner, which originally covered the whole lot. On the 24th of March, 1873, the executors upon the request of the mortgagor, released the northerly forty feet of the lot from the lien of their mortgage, so that, from that time, their mortgage was a lien only upon the southerly sixty feet; and there is due thereon the sum of $6,300 and interest from June 20, 1877. The defendant Ethan H. Howard, is the assignee of a mortgage on the northerly forty feet of the lot, executed by Harriet C. Lymburner, March 24, 1873, on which is unpaid $5,462, and interest from March 24, 1878; and this mortgage is accompanied by the bond of the mortgagor. Mrs. Lymburner, the mortgagor, died seized of the whole lot June, 1878, and by her will devised the sixty feet and the forty feet, by separate devises, in trust for different beneficiaries named.

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It was admitted on the trial, that the value of the sixty feet covered by the mortgage to Hamilton M. Lymburner and George C. Torrey as executors, is $12,000, and that the value of the forty feet covered by Howard's mortgage, is $8,000, and the judge found that the value of the forty feet, was four-tenths of the value of the entire premises. The sum due upon the three mortgages exceeds by a few hundred dollars the value of the whole lot. It is plain that if the forty feet are first sold on the plaintiff's mortgage, and should sell for their full value, there would remain, after paying the plaintiff's mortgage, less than $2,000 to apply upon the Howard mortgage, and he would be left with an unsecured claim of more than $4,000. The devisees of the sixty feet, would, at the same time, as the result of the payment of the plaintiff's mortgage out of the proceeds of the sale of the forty feet, hold the equity of redemption in the sixty feet, relieved of the lien of the original mortgage, and subject only to the mortgage to Lymburner and Torrey, as executors.

This result would be manifestly inequitable. The sixty feet, according to the admission of the parties, is worth several thousand dollars more than the amount of that mortgage. Mrs. Lymburner was bound to pay the Howard mortgage in full, and as between her, and Howard, the latter had a clear equity to demand that the sixty feet should be first sold, and her interest therein exhausted, before resort is had to the forty feet covered by his mortgage. Her devisees stand in her shoes, and equity requires, if it can be done, that the value of the equity of redemption in the sixty feet, over and above the mortgage to Lymburner and Torrey, should be applied to reduce the plaintiff's mortgage, and thereby pro tanto relieve the forty feet, and protect the Howard mortgage.

The difficulty is to work out this result without impairing the rights of Lymburner and Torrey, whose mortgage is prior to the Howard mortgage. The mortgage to the plaintiff being upon the whole lot, and the mortgage to the executors being upon the sixty feet alone, and the Howard mortgage being alone upon the forty feet, and subsequent in date, they are entitled, upon the well-settled doctrine of equity, to have the forty feet first sold to satisfy the plaintiff's mortgage, if necessary for their protection. The general rule is that where there are several successive grantees of different portions of mortgaged premises, the land on foreclosure, is to be sold in the inverse order of alienation, and this secures the equitable rights of the parties as between themselves. The first grantee of a part of the mortgaged premises, who has purchased for full value and without any agreement to assume the mortgage, may justly claim that the burden of the incumbrance shall be cast in the first instance upon the remaining lands of the grantor, and a second or other grantee takes subject to the equity of the prior grantee. The same principle is applicable to the case of successive mortgagees of parts

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of mortgaged premises, on a foreclosure of a prior mortgage on the whole property, where by its application the equitable rights of all parties will be secured. (Stuyvesant v. Hall, 2 Barb. Ch. 151.) But this is a rule of equity and yields to circumstances. (Guion v. Knapp, 6 Paige, 35; Kellogg v. Rand, 11 *id.* 59.) The rule is established to adjust and preserve the equitable rights of claimants holding distinct interests in parts of the mortgaged property, according to the maxim *prior tempore potior jure.*

The application of the rule between grantor, and successive grantees of parts of mortgaged premises, if applied in this case, by requiring that the forty feet should be first sold, would destroy, to a great extent, the security of the Howard mortgage. If the protection of the mortgagees in the second mortgage, required that this course should be taken, there would be no alternative, and the rule should be applied. But if the land can be sold so as to protect both securities, then equity requires that the sale should be so made; or if they cannot be protected in full, then that the sale should be made so as to make the loss upon the Howard mortgage as small as possible, consistently with the rights of all parties. The object of the rule adverted to will then be attained, although the rule itself in this particular case, is departed from. We think the judgment in this case should direct that the whole lot be sold on the plaintiff's mortgage, and that out of the proceeds, the liens be paid according to their priority.

The claim of the counsel for the defendant Howard, that the judgment should direct the sale in the first instance of the sixty feet, and that, if this part of the lot should not bring enough to pay the first and second mortgages, then that the forty feet be sold to pay the deficiency, is impracticable. The plaintiff could not sell the forty feet under his judgment, after he had realized sufficient from the sale of the sixty feet, to pay his mortgage and costs. By selling the whole property and distributing the proceeds as we have indicated, upon the conceded facts, neither of the subsequent mortgagees will receive anything, out of the part of the lot, not subject to the lien of his mortgage.

The judgment should be modified in accordance with this opinion, and also by striking out the costs awarded against the defendant Howard, in the court below, and awarding costs to the plaintiff in the Supreme Court, and in this court, payable out of the proceeds of sale.

All concur except Miller, J., not voting and Rapallo, J., absent.

Judgment accordingly.[21]

[21] "A subsequent mortgage of a part of the equity of redemption, by the owner of the whole of the mortgaged premises, is only an alienation of that part thereof to the extent of the money due on such junior mortgage, and for which the owner of such junior mortgage has no other

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GILLIAM v. McCORMACK.

SUPREME COURT OF TENNESSEE, 1886.
85 Tenn. 597.

LURTON, J. The report of the Commission of Referees contains a full statement of the facts. The reasoning, as well as the conclusions, of Judge Caldwell, who prepared that report, being altogether satisfactory, is adopted and made a part of this opinion. It is as follows:

"These bills were brought to compel an application of the equitable doctrine of marshaling securities.

"The defendant, M. McCormack, owned three lots of ground—A, B and C—in the city of Nashville, which he mortgaged to various creditors, as follows:

"First—A, B and C, to McFarland, May 31st, 1877, to secure $1,000.

"Second—A and B, to McFarland, June 26th, 1877, to secure $6,996.55.

"Third—B, to James McCormack, June 8th, 1878, to secure $4,075.

"Fourth—A and B, to Jane Gilliam, July 31st, 1878, to secure $1,500.

"Fifth—C, to Merritt & Ronaldson, November 20th, 1878, to secure $1,671.66.

"Sixth—A and B, to Annie Lawrence, January 28th, 1879, to secure $1,160.

"There were other mortgages, which need not be mentioned.

"All the necessary parties were brought before the Court, and the three lots were sold under decree, and reports of sale confirmed. The amount realized for A was $8,660, for B $6,500, and for C $3,125. The total being less than the aggregate of the secured debts, a loss must fall on some creditor; hence this contention.

"The Chancellor decreed that the costs and taxes accrued be paid pro rata out of the funds realized from the three lots respectively, and further, (1) that the whole debt of Merritt & Ronaldson be paid out of the net proceeds of lot C; (2) that the balance of such proceeds be applied in satisfaction of McFarland's debt secured by mortgage on A, B, and C; (3) that the residue of the latter debt, and the other debt of McFarland, be paid pro rata out of the net proceeds of A and B; (4) that the balance of the net proceeds of B shall be applied to debt of James McCormack; (5) that the balance of the net proceeds of A be used first in payment of Jane Gilliam's debt and then in payment of that of Annie Lawrence.

security which should in equity be first resorted to." Walworth, Ch., in Kellogg v. Rand, 11 Paige (N. Y.) 59.

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"This division of the funds paid all the debts mentioned in full, except those of Annie Lawrence and James McCormack.

"The latter only has appealed, and by his counsel insists upon a different distribution.

* * * * * * *

"Our solution of the case is this: The three funds should severally pay their proportionate part of McFarland's debt secured by mortgage on A, B, and C; then the remaining proceeds of A and B should proportionately pay the other debt of McFarland secured by mortgage on A and B. From the residue of the three funds payment should be made as follows: McCormack should receive the residue of the proceeds of B, on which he had a mortgage; Merritt & Ronaldson should be paid out of the residue of the proceeds of C, on which they had a mortgage; Jane Gilliam should receive payment out of the residue of the proceeds of A, and the balance of that fund should be paid to Annie Lawrence, the two ladies having successive mortgages on A. They likewise had mortgages on B at the same time; but B's proceeds are previously exhausted by McCormack, a prior mortgagee. Such an order of distribution will give to every mortgage creditor the benefit of his or her security according to priority in time, which is eminently just and equitable to all.

"The result of the Chancellor's decree is substantially the same as we have indicated. The first debt of McFarland being small, that part of it chargeable upon the proceeds of C, by the rule of proportion we have stated, would leave more than enough of that particular fund to pay Merritt & Ronaldson. It being evident, then, that they should receive full payment, the Chancellor directed, in the first instance, that their debt be paid. That being done, the whole residue of the proceeds of C (and not simply its proportionate part) was first applied to McFarland's first debt that secured by A, B, and C. To this extent the securities were marshaled in favor of the subsequent incumbrance of A and B, and McCormack got the benefit of it.

"Our view as to the rule that should govern such a case is sustained by Green v. Ramage, 18 Ohio 428. The case of Conrad v. Harrison, 3 Leigh, Va. R., 576, seems to be an authority in conflict. Nevertheless, we have not a doubt as to the correctness of our conclusions.

"The decree of the Chancellor should be affirmed at the cost of the appellant."

In support of the conclusion contained in the report in favor of the pro rata payment of the several mortgages, in the order of priority, out of the proceeds of the parcels covered by each mortgage, we add certain suggestions which occur as additional reasons for declining to marshal these securities to the prejudice of the sec-

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ond mortgage on lot C, and of the third and fourth mortgages on lot A. The equitable doctrine of marshaling securities is a pure equity, and in nowise depends upon contract. The whole principle, as stated by Professor Pomeroy, is this:

"That a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. The general rule is that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only—as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another—the former must seek satisfaction out of that fund which the latter cannot touch." Pomeroy Eq. Jurisprudence, Sec. 1414.

Now, if in this case there were but two mortgages—one on three lots and the other on only one—the equity of marshaling would be applied, and the dominant creditor having a mortgage on all three of the lots would be required to first exhaust the two lots upon which the second mortgagee could not proceed. So, if there were but three mortgages, the first being on lots A, B, and C, the second, as is the case here, on lots A and B alone, and the third, as is likewise the fact, upon lot B alone, the securities would be so marshaled as to require the senior mortgagee to first exhaust lot C, upon which he alone could go, and thus leave lots A and B to be subjected by the two second mortgagees. Indeed, there would be no trouble in going further, and in behalf of the third mortgage, which rests upon lot B only, the two prior mortgagees might well be required to first subject lot A, upon which they alone could go. But this is not the situation of these securities at the time that the equity of marshaling is invoked. Before the third mortgagee had successfully invoked the marshaling in his favor, which we have shown could have been granted without prejudice to the rights or equities of any one, a fourth mortgage is executed, which is placed upon lots A and B, and a fifth is placed upon lot C. Now, when the third mortgagee asks to have the first mortgagee forced to subject lot C to his debt, the demand is resisted by the fifth mortgagee, who says this is to my prejudice; there was upon lot C—upon which alone I have a mortgage—but one mortgage senior to mine, and that ought to be satisfied pro rata out of the three lots upon which it rests, that my security may bear only its proportionate part of the prior burden. The situation has, therefore, changed from what it was when the third mortgage was executed upon lot B alone.

The contention of the learned counsel representing this third mortgagee is that the common debtor could not, by the execution of another mortgage upon lot C, cut off or deprive the third mortgagee of the right he had, or, rather, might have had, if the doctrine of marshaling has been invoked at the time the third mortgage was

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made, or at any time before another mortgage was placed on lot C. The proposition contended for would amount to this: That if at any time the situation of several subsequent mortgagees is such that as between themselves such a marshaling of securities could have been invoked, by proper application to a court of equity, as would result in the satisfaction of the senior mortgages out of a fund which the junior mortgagee could not reach, whereby the fund upon which he could only go should be left for his satisfaction, that this inchoate equity cannot be disturbed, displaced, or defeated by any subsequent alienation or mortgage by the common debtor or mortgagor. This rule, if admitted, would result in elevating an inchoate equity to marshal assets or securities to the high plane of a lien. Yet it would be an incumbrance or lien of which a subsequent mortgagee would have no notice by record or otherwise. It would clearly be in antagonism to our registry laws.

This equity to have securities marshaled, if it can be called an equity until actually invoked, cannot be of a higher order than the equity of the vendor. Yet the latter is defeated, according to our decisions, by alienation of the lands to a purchaser, to a mortgagee, and even to a trustee under an assignment to pay debts, before the actual filing of a bill to enforce the equity. A marked distinction exists between the cases holding lands sold subject to the lien of a vendor, or that of a mortgage or judgment liable for the discharge of such lien in the inverse order of alienation. In all such cases the parcels were all actually bound by a lien or incumbrance, of which the alienees had notice, either actual or constructive, and not by a mere equity, such as that to have a marshaling.

It follows, therefore, from this view of the question, that the equity to marshal assets is not one which fastens itself upon the situation at the time the successive securities are taken; but, on the contrary, is one to be determined at the time the marshaling is invoked. The equity can only become a fixed right by taking proper steps to have it enforced; and until this is done it is subject to displacement and defeat by subsequently acquired liens upon the funds. The qualification upon the doctrine of marshaling—that marshaling will not be permitted to the prejudice of the third person, whether wholly or only partially dependent upon this principle—is one well settled, and operates to defeat the contention of appellant.

Upon these two grounds the case of Green v. Ramage, 18 Ohio, 428, rests. That case was this: W had a lien on lots 14 and 39, and G on 14, and H on 39, in this order of date. G contended (just as does the third mortgagee in this case) that as he had the right, before H took his second mortgage on 39, as between himself and W, to throw W on 39 first, therefore this right fastened itself into

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the situation so as to turn H's second mortgage on 39, when taken, into virtually a third mortgage.

The Court, after conceding that if there was nobody to be considered but W with two funds and G with only one of them, W would have to exhaust his exclusive fund before touching the common fund, added:

"In this case, however, there are three parties interested. If G compel W to exhaust lot 39 before he comes on lot 14, then G will have the benefit of the fund arising from lot 39, although he took no security on it. But H, by this arrangement, will be deprived entirely of this security on 39, although he took a mortgage on it. We think the rule cannot be applied in a case of this kind. The principle is one established for the purpose of securing to parties the rights to which, upon the principles of natural equity, they are entitled. To deprive H in this manner of his security would be manifestly unjust."[22]

So in the case of Lieb v. Stribbling, 51 Md., 285, S mortgaged to R five lots. Afterward four of these lots became incumbered with a mechanic's lien, and the fifth lot by a second mortgage to C. The contention was that S should first exhaust the fifth lot upon which C had his mortgage, so as to disincumber the four lots upon which the mechanic's lien was an incumbrance second to that of S. This was refused upon the ground that the assets would not be marshaled to the prejudice of C, who had no notice of the equity of the complainant.

In the case of Marr v. Lewis, 31 Ark., 203, the facts were that A held a mortgage upon two tracts of land; B also held a mortgage on one of them. In a proceeding to foreclose, B sought to compel him to exhaust the tract not embraced in his mortgage first. The widow of the mortgagor, who was also a party, claimed a homestead in the latter tract. Held: that by reason of the widow's equity the securities should not be marshaled. The rule as laid down by the Court in that case was this:

"When one creditor has a security upon two funds, another having a security on one of them, may, if necessary to the protection of his security, compel the other to resort to the fund not embraced in it, if it can be done without prejudice to the other creditor, or in-

[22] The report of this case states that "Ramage had the legal title to lot 14, and an equitable title to lot 39. * * * He conveyed by mortgage, recorded October 10th, lot 14 to Wilson. He also assigned the title bond, by which he held lot 39, to Wilson to secure the same debt secured by the mortgage." The court said, "There was nothing connected with Wilson's lien that was even calculated to put him [Hillier, the mortgagee of lot 39] on inquiry in reference to Wilson's mortgage on lot 14, because Wilson's liens on these two lots were created by separate instruments."

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justice to the common debtor or third person having interest in the fund."

In the case of McArthur v. Martin, 23 Minn., 75, the Court said:

"Where A holds a security upon two tracts of land, one of which is a homestead, and B holds a security only upon one not a homestead, A will not be compelled to exhaust the homestead tract first in order to leave the other tract for B."[23]

The English editors of White & Tudor's Leading Cases in Equity, 4th Am. Ed., Vol. II., Part I., 205, say:

"Marshaling is not enforced to the prejudice of third persons. Thus, in Averall v. Wade, L. & G., t., Sugden, 252, where a person, being seized of several estates, and indebted by judgments, settled one of the estates for a valuable consideration, with covenant against incumbrances, and subsequently acknowledged other judgments, it was contended by the subsequent judgment creditors that, as they only affected the unsettled estates, on the principle in Aldrich v. Cooper, as they had only one fund, they had a right to compel the prior judgment creditors who had two funds—the settled and unsettled estates—to resort to the settled estates; or, at any rate, that the settled estates ought to contribute to the payment of the prior

[23] The authorities are about equally divided as to the right to marshal an encumbrance onto homestead property. See Jones, Mortgages, § 1632. In respect to this problem, no distinction seems to have been taken between a junior mortgagee of the non-homestead land and a subsequent purchaser of the same by warranty deed, except in Iowa.

In Abbott v. Powell, 6 Sawyer 91 (U. S. District Court, District of California), Hoffman, J., said, "In this state, it appears to be settled, that a mortgagee of lands not included in a homestead, can not compel a prior mortgagee, whose mortgage includes those lands and also the homestead, to resort to the latter before selling the lands mortgaged to the junior mortgagee. (McLaughlin v. Hart, 46 Cal. 638.)

"It has also been held that the wife may, after a judgment against her husband has become a lien on the home property, file a declaration of homestead upon it, and acquire such an interest in it that she can compel the sheriff to exhaust the husband's individual property before subjecting it to sale. (Bartholomew v. Hook, 23 Cal. 277.) But neither of these cases contains the slightest intimation that where a person has made a mortgage on two pieces of property, and afterwards makes a second mortgage on one of them, the equitable right of the junior mortgagee to compel the first mortgagee to resort in the first instance to the property on which he has an exclusive claim, can be taken away or impaired by a declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee. I have been referred to no case which hints at so inequitable a rule. The junior mortgagee, when accepting the security of a second mortgage, had a right to repose upon the protection afforded him by the familiar rule of equity, and to act upon the assurance that the first incumbrancer would be compelled to resort to the property on which he had an exclusive claim, before coming on the property covered by the second mortgage, and that no act of the mortgagor could deprive him of the right to compel him to do so."

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judgments. Lord Chancellor Sugden, however, held that the subsequent judgment creditors had no equity to compel the prior judgment creditors to resort to the settled estates. On the contrary, that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estates contribute; observing, after a close examination of Aldrich v. Cooper, that upon the whole of the case you will find Lord Eldon, in the application of the principle, 'carefully avoids dealing with the rights of third persons.' So in Barnes v. Racster, 1 Y. & C. C. C., 401 (a case almost identical with the one under consideration), Racster, being seized of Foxhall coppice and a piece of land noted on plan of the estate as No. 32, mortgaged, in 1792, Foxhall to Barnes; in 1795, Foxhall to Hartwright; in 1800, Foxhall and No. 32 to Barnes; and in 1804, Foxhall and No. 32 to Williams; the subsequent incumbrancers took with notice. It was held by Sir Knight Bruce, R. C., that the Court ought not, as against Williams, to marshal the securities. His Honor said that, circumstanced as the case was, Hartwright and Williams stood, with regard to the matter in dispute, on an equal footing; that Barnes ought to be paid out of the respective proceeds of No. 32 and Foxhall, *pari passu* and ratably according to their amounts; that the residue of the proceeds of Foxhall ought to be applied toward paying Hartwright, and that the residue of the proceeds of No. 32 ought to be applied toward paying Williams —a conclusion, as he considered, entirely in accordance with the principles on which Larry v. Duchess of Athol, Aldrich v. Cooper, and Averall v. Wade were decided."

These cases, and the sound equity upon which they are manifestly founded, sustain the proposition that marshaling is a pure equity, and does not at all rest upon contract, and will not be enforced to the prejudice of either the dominant creditor, or third persons, or even so as to do an injustice to the debtor. We are not disposed to extend the doctrine so as to affect the equities or legal rights of third persons.

The case in 3 Leigh, Va., 576, so far as we have been able to discover, stands alone. It is not supported by authority, and we are not content with its reasoning. The other cases relied upon by counsel for appellant all seem to be cases of sales of lands actually incumbered by an express lien, and are not in conflict with the views expressed by us.[24]

[24] See also, Terry v. Woods, 6 Smedes & M. (Miss.) 139; Williams v. Washington, 16 N. Car. 137; Wilson v. Otis, 5 Ohio Cir. Ct. 228.

If, in the principal case, McCormack had been a purchaser by warranty deed of lot B, the authorities in Tennessee would have entitled him to exoneration as against Merritt & Ronaldson. Hunt v. Ewing, 80 Tenn. 519.

That a junior mortgagee acquires, by the "two fund" doctrine, an equity which is enforcible against a subsequent purchaser or encum-

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WORTH v. HILL.

SUPREME COURT OF WISCONSIN, 1861.
14 Wis. 559.

By the Court, PAINE, J. This was an action to foreclose a mortgage, and the appeal presents a contest merely between two subsequent incumbrancers of different tracts covered by this mortgage, as to which was entitled, in equity, to have the tract of the other sold first. Perhaps the following general statement of the situation of the parties, will be sufficient to a proper understanding of the question decided.

The mortgage being foreclosed covered two different tracts in different towns. The defendant Buck, who is the appellant, held a mortgage next to this in point of time, covering one of the tracts contained in this mortgage, and other land not covered by this, in the same town. The defendant Mowry held a mortgage next to Buck's in point of time, but upon the land in the other town covered by this mortgage, and also upon another tract. Thus it will be seen that the mortgage of Mowry was not upon any part of the land mortgaged to Buck, but their interests conflict by reason of the mortgage which is being foreclosed, which is prior to both, and covers a part of the land incumbered by each of these defendants. It further appeared that there was a mortgage prior to all these, covering the tract in the Buck mortgage and the one in the Mowry mortgage which are not contained in the mortgage now being foreclosed and that such prior mortgage had been foreclosed, and that part which was covered by Mowry's mortgage adjudged to be sold before the part covered by Buck's. It was further proved that the other tract covered by Buck's mortgage was ample security for the amount of the debt secured by that mortgage. It was even shown to be of greater value than the entire amount of the Buck mortgage and the first mortgage before referred to, prior to all, for the satisfaction of which the other tract covered by Mowry's mortgage had been adjudged to be first sold. Upon this state of facts, the court below decreed that the portion covered by Buck's mortgage should be sold in this foreclosure before that covered by Mowry's, and from that part of the decree Buck brought this appeal.

His counsel relies upon the established equitable rule, that in

brancer with actual or constructive notice, was held in Hunt v. Townsend, 4 Sandf. Ch. (N. Y.) 510, and The Olive A. Carrigan, 7 Fed. 507. See also Meek v. Thompson, 99 Tenn. 732. In Bank of Orangeburg v. Kohn, 52 S. Car. 120, it was held that an amendment to the state constitution curtailing this equity was not to be construed as affecting the equity of a mortgagee whose mortgage antedated the amendment, as the equity was a substantive right and not a mere matter of remedy.

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foreclosure cases, where the land has been subsequently conveyed by the mortgagor, it shall be sold in the inverse order of alienation. The justice of this rule has been sometimes questioned, but we regard it as not only well settled, but correct upon principle, and have repeatedly enforced it. But at the same time we think it may be controlled by other established equitable principles, where the facts render them applicable, and such, we think, was the case here. It is a familiar principle, that where one creditor has security upon two funds, and another has security upon one of them only, the latter may compel the former to resort first to that fund which he cannot reach. And although this is not a direct proceeding to accomplish that object, yet it is substantially that, inasmuch as Mowry sets up these facts to rebut the equity Buck would otherwise have as against him. For the result, if the judgment had been otherwise, would have deprived Mowry of his security entirely. The one tract covered by his mortgage having already been adjudged to be sold first, for Buck's benefit, now if the other should be adjudged to be sold first, he would have nothing left. Whereas it appears by the testimony, that upon the decree as rendered, Mowry is protected, and Buck left with ample security for his debt.

Suppose A mortgages a tract to B, then gives a second mortgage on a part of it to C, which mortgage also covers other tracts, and then gives a mortgage on another part to D? On a foreclosure of B's mortgage, the ordinary rule, based merely on the order of alienation, would be to sell D's part first. But suppose D could show that the other tracts covered by C's mortgage were an ample security for his debt, would not that raise an equity sufficient to overcome the ordinary rule, and require, as between C and D, that C's part should be first sold? I think so; and that is substantially the relation which these defendants hold to each other in the present case. I can see no reason why the principle requiring the creditor having two funds to resort first to the one which the other creditor cannot reach, is not applicable to such a case. It is true that ordinarily the adequacy of the first fund might be tested by an actual sale, and the creditor who was compelled first to resort to that might still be in a position to resort to the other to supply any deficiency; and here Buck may not be left in such a position. I think that is good reason why such a decree as the one made in this case, should be made only upon clear proof of the entire inadequacy of the remaining security. But I am not prepared to say that courts should not act upon such proof, or that a party so situated has any absolute right to have the adequacy of his remaining security tested in all cases by an actual sale. It is obvious that such a test could not be had in a case like this, and consequently, if that rule were adopted, it would lead to the injustice of cutting off the last mortgage entirely, though it might not be at all necessary for the protection of

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the second. Courts are constantly adjudicating upon the most important rights of parties upon the theory that human testimony can establish facts with sufficient certainty to justify such adjudication, and I think the question of the adequacy or inadequacy of a security should form no exception.

I think the judgment should be affirmed with costs, against the appellant, in favor of the plaintiffs and of Mowry.

Judgment affirmed accordingly.

QUACKENBUSH v. O'HARE.

COURT OF APPEALS OF NEW YORK, 1892.
129 N. Y. 485.

O'BRIEN, J. The order appealed from disposed of surplus moneys amounting to the sum of $2,737.75, arising upon the foreclosure of a mortgage made by the defendant to one Elizabeth Hillenbrand, February 28, 1884, and recorded the following day. It was subsequently assigned to the plaintiff and covers certain premises on Second avenue in the city of New York. The controversy in regard to the surplus was between the defendant Cannon on the one hand and the defendants Washburn & Barnes on the other. The referee reported that Cannon was entitled to have his claim paid out of the fund first, and this report was confirmed at the Special Term, and the order of that court affirmed at General Term. Washburn & Barnes are the only parties who appeal to this court.

It appears from the findings that the defendant Cannon is the owner of a mortgage of $2,000, dated January 9, 1885, and recorded July 22, 1885, which covers the premises sold under the decree of foreclosure in the action, and it is beyond all dispute a lien next to that of the mortgage foreclosed by the judgment upon which the surplus arose. But this mortgage is a lien on three separate pieces of real estate: (1) The house on Second avenue which was sold under the judgment in this case, and from which the surplus came; (2) certain premises on Seventy-fourth street; (3) certain premises on West Third street. Washburn & Barnes hold a junior mortgage for over $3,000, dated January 28, 1887, and recorded February 11, 1887, covering the Second avenue property only. The Murray Hill Bank holds a mortgage of $2,500, dated November 11, 1886, which covers the Seventy-fourth street property only. One Steers holds a mortgage of about $11,000, dated February 2, 1887, covering the West Third street property only. One Suydam is the owner of a mortgage of $2,000, dated July 9, 1885, which covers the three pieces

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of property, and the same has been assigned to Cannon as trustee for the owner.

Washburn & Barnes insist that they should have the surplus to pay their mortgage, which is a lien next to that of Cannon, and that he should be driven to a sale of the other two pieces of property covered by his mortgage, which they claim is abundant security for the payment of his debt. But the Murray Hill Bank, holding a mortgage on the Seventy-fourth street property, objects to this, as its security will thereby be endangered. Steers also objects, as this will endanger his security, which is confined to the West Third street property only, while Cannon, holding a mortgage on the three pieces, also objects. The lien of Cannon upon the land, next to that of the mortgage foreclosed, was transferred from the land to the surplus fund. No one claims that he has not the first lien, and the only question is whether he can be prevented from enforcing his prior lien to enough of the surplus money to satisfy his mortgage. The owners of the Seventy-fourth street and West Third street property are not parties to this action. Had all the parties interested in these two pieces of property been made parties to this action, and all the property sold and the proceeds in court, it is possible that a court of equity could apply the doctrine of sale in the inverse order of alienation, or would so marshal the securities as to accomplish the purpose which Washburn & Barnes seek to attain in these proceedings. (Burchell v. Osborne, 119 N. Y. 486.) But that must be done in an action for that purpose where the whole fund resulting from the sale of all the pieces of property is under the control of the court, and all the parties interested are before it. There is no room for the application in a proceeding like this, and upon facts such as exist here, of the equitable rule that where a creditor has a double fund to which he may resort for satisfaction of his debt, and another creditor has only one of these funds, the first creditor will be required primarily to resort to that fund for the satisfaction of his debt, over which he has the exclusive control. That rule, of course, implies the right of the creditor with the double fund or security to appropriate both funds if necessary. The attempt is made in this proceeding to displace the prior lien of Cannon not by payment, but by proof which, it is claimed, shows that the remaining two pieces of property are sufficient to pay the debt. But the owner of a mortgage cannot be deprived of his lien on the application, in a proceeding like this, of a junior mortgagee upon proof, however strong or apparently conclusive, that he still has sufficient property to pay his debt. The court cannot release a lien without actual payment merely because witnesses testify, and the referee finds, that the holder of the lien has other property of his debtor to which he can resort for the satisfaction of his debt. Had Washburn & Barnes offered to pay the prior mortgage held by Can-

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non, and demanded an assignment of it, it is possible they might be subrogated to all the rights and to the position of Cannon, and after receiving the surplus money here be entitled to call upon the owners of the Seventy-fourth street and West Third street property to contribute towards the payment of the mortgage. But whatever equitable rights they might have in an appropriate proceeding, it is quite clear that they cannot in an application for surplus money, displace the prior lien by proof or finding that the other property is sufficient in value to pay and discharge the debt secured by the lien. Their remedy, if any, is by means of some other proceeding.

The order should, therefore, be affirmed, with costs.

All concur, Andrews and Gray, JJ., in result.

Order affirmed.[25]

WINSLOW, J., in GOTZIAN v. SHAKMAN, 89 Wis. 52 (1894). This is an action by creditors who have attached the entire stock in trade of a trading firm to compel another creditor, who has a prior attachment on the same property, to exhaust certain mortgage securities given to him by one member of the firm before resorting to the fund in court arising from the sale of the attached property.

* * * * * * *

But a further well-established equitable rule is invoked by the defendant, and that is that equity will not marshal assets in the manner desired here, to the injury of the prior creditor: 3 Pomeroy's Equity Jurisprudence, sec. 1414. We are unable to see what substantial injury will be inflicted upon the defendant by requiring him first to exhaust his mortgage security, at least upon lands within this state. It is true, there must result some delay, in case foreclosure is necessary, but there will be no diminishing of security, because the fund realized from sale of the stock of goods should and must be kept intact pending the defendant's attempt to realize upon his mortgages. During this time, no part of his security will be taken from him. It is true that delay to the prior creditor has been sometimes spoken of as a bar to the relief here asked, but we are not ready to subscribe to the doctrine that mere delay is sufficient to compel the court to deny the relief when no other injury is involved. Some delay is a necessary consequence of the enforcement of all rights, and, if a possible delay would defeat the right of a junior creditor to have the assets of his debtor marshaled, such marshaling would rarely, if ever, take place. The true rule, we think, is well expressed in Everston v. Booth, 19 Johns. 486, where it is said that the relief will not be given "if it will endanger thereby

[25] Compare, Welch v. Beers, Inglehart v. Crane & Wesson, and Gray v. Loud & Sons Co., supra.

See also, Mason v. Payne, Walker Ch. (Mich.) 459; Mix v. Hotchkiss, 14 Conn. 32; Long v. Kaiser, 81 Mich. 518.

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the prior creditor, or in the least impair his prior right to raise his debt out of both funds," and it is further said that there is "no principle in equity which can take from him any part of his security until he is completely satisfied." Applying these principles to this case, we discover no ground on which to refuse the relief which the plaintiffs ask, if it shall prove that the allegations of the complaint are true. With the funds realized from the sale of the attached property in court, the defendant's rights are not endangered, nor his right to raise his debt out of both funds impaired, nor is any part of his security taken from him. It seems very questionable whether the court should require the defendant to foreclose the mortgages on the Minnesota and Dakota lands, because they are beyond the jurisdiction of the courts of this state: Denham v. Williams, 39 Ga. 312. But it is not necessary to decide this point on this demurrer, as we think that so far as the mortgages cover lands within this state, at least, the plaintiffs are entitled, under the allegations of the complaint, to some relief.[26]

[26] See 19 Am. & Eng. Enc. (2d ed.) 1262, 1264.

As to whether a mortgagee may be compelled to exhaust his real security before pursuing a personal security, see Warren v. Hayzlett, 45 Iowa 235; Jones, Mortgages, §§ 1220, 1221. See also, Tiffany, Real Property, § 558.

As to whether a mortgagee may be compelled to exhaust a personal security before pursuing his real security, see Whittaker v. Belvidere Co., 55 N. J. Eq. 674.

As to whether a mortgagee may be compelled to exhaust one personal security before pursuing another, see Hyde v. Miller, supra, and note; also, Jones v. Stienbergh, 1 Barb. Ch. (N. Y.) 250.

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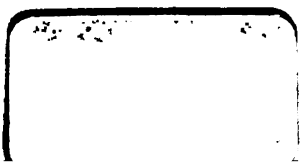

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